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Death of President W. A. Blount

William A. Blount, President of the American Bar Association, died in the city of Baltimore, Md., on the 15th of the present month.

The news of the death of Mr. Blount will come as a great shock to such of the members of the American Bar Association as have not been aware of his illness. The immediate cause of death was Angina Pectoris, the first symptoms of which appeared during the autumn of 1920, but at that time there was nothing alarming about his condition. He attended the meeting of the Executive Committee at New Orleans during the first week of January last and to those unacquainted with his condition seemed to be enjoying excellent health; although he was at that time a great sufferer, he displayed no outward indication of his illness. He attended strictly to the duties devolving upon him as Chairman of the Executive Committee, and it was not until he had taken eminent medical advice that the real character of the disease became known. During the month of February, his physicians advised that he take a long and complete rest, and accordingly he retired to a sanatorium on February 26th, and from that time on abstained from participation in business of any kind.

Toward the end of May, on advice of his physicians, Mr. Blount left his home in Pensacola, intending to proceed by way of Baltimore, to Watkins Glen, N. Y., for treatment at a sanatorium at that place. He arrived in Baltimore on the 3rd of June.

It was hoped that by long rest and careful treatment Mr. Blount would entirely recover his health and his death was a surprise even to those who were aware of his serious condition.

Mr. Blount was born October 25, 1851, in Clark County, Ala., and removed to Pensacola, Fla., in early childhood. His father, Alexander C. Blount, also a lawyer, was descended from James Blount, who came from England in 1669, and settled in Chowan County, N. C. His mother's maiden name was Julia Elizabeth Washington.

He entered the University of Georgia in 1870 and, upon his graduation, taught school for a time, and later became Adjunct Professor in his Alma Mater. In 1878 he was united in marriage with Miss Cora Moreno, of Pensacola.

He was a member of the Sons of the American Revolution, The Order of Cincinnati and of the Phi Beta Kappa Fraternity. The degree of LL.D was conferred upon him by the University of Florida in 1902. He was a man of great strength of character, high legal attainments and great business activity; he gave much time to the service of the public and many honors were bestowed upon him in his own State and elsewhere which evince the confidence his character and ability inspired among those with whom he came in contact.

He was Chairman of a Commission to revise the statutes of Florida and his work upon that Commission is evidenced by the present Code of that State. He served as a member of the Commission appointed to assist the Supreme Court of the United States in the revision of the Equity Rules. He also served by appointment of the Governor of Florida on the Legislative Drafting Committee charged with the duty of revising the Court Procedure of that State. He was a member of the Florida Constitutional Convention of 1885, and served also as State Senator from Escanbia County, Florida. He was a director of the Audubon Society, the Florida Historical Society, former President of the Florida State Bar Association, President of the Chamber of Commerce of Pensacola and

was actively connected with many well known business enterprises.

His career at the Bar brought him in contact with the leaders of his profession in various parts of the country, especially in the great business centers of New York and Chicago. President Blount exhibited marked ability as a lawyer and was recognized as one of the leaders of the American Bar.

His activities in the American Bar Association cover a period of more than twenty-six years. Prior to his election as President of the Association in 1920, he had filled many important stations in the organization and always performed the duties imposed upon him with fidelity and efficiency. His work always indicated a conscientious regard for the obligations devolving upon him and a desire to give to the association service of the highest type. He served as Chairman of the section on Legal Education and was for several years president of the National Conference of Commissioners on Uniform State Laws.

Mr. Blount was gifted with a most charming personality; always a gentleman, conscientious in the performance of every duty, he won the friendship and esteem of all with whom he came in contact; regular in attendance upon the meetings of the American Bar Association and deeply interested in everything pertaining to the welfare of that organization. Few men will be missed by those in attendance at the meetings of the Association more than our beloved President.

He is survived by his wife and two sons—F. M. Blount and Frederick J. Blount—and two daughters —Mrs. Dowdell Brown and Mrs. Louis A. Craig, Jr.

Protecting Treaty Rights of Aliens

Senator Kellogg of Minnesota, on June 2, introduced the bill "For the better protection of aliens and for the enforcement of their treaty rights" which was approved by the American Bar Association at the St. Louis meeting. The bill was recommended by the Committee on Jurisprudence and Law Reform and is the same measure that was endorsed by the Association at Salt Lake City.

It provides, in substance, that the President be authorized to direct the Attorney General to file a bill in equity in the proper U. S. District Court against any person or persons threatening to violate the treaty-secured rights of aliens, and that the provision shall apply to such acts threatened by State officers under the alleged justification of a law of the state in which the acts are to be committed; that whenever any civil or criminal action is brought in a State court against an alien to enforce an act which the President deems violative of his treaty-secured rights, the Attorney General of the United States may at any time before hearing or trial on the merits file an intervening petition for removal of the cause to the proper U. S. District Court; that any act committed in any State or territory in violation of an alien's treaty-secured rights, which is a crime under the laws of that State or territory, shall also be a crime against the United States, and may be prosecuted in the Federal Courts within the period limited by the State or Territorial laws and punished as provided in those laws; that the President may use Federal Marshals and their deputies and, if necessary, the army and navy to enforce the act.

There was an interesting discussion at St. Louis, during which certain members expressed apprehension that the measure perhaps went too far and might lead to a confusion of State and Federal jurisdictions. Mr. Charles Evans Hughes pointed out that there was no purpose in the bill to give a broad concurrent jurisdiction, regardless of obligations which had nationally been assumed by treaty. And Mr. Moorfield Storey declared that there was nothing extraordinary in the proposed litigation. The alien or citizen of a different state now has the right to move a litigation in which he is interested into the courts of the United States in order that he may have a tribunal not influenced by the local community. In brief, his civil rights are now protected and "why," he asked, "should not those more precious rights which affect his liberty be given the same protection.

Triumph of a Movement

When the Chicago Bar Association undertook to secure the formation of a coalition ticket in Cook County to save the circuit bench from domination by a political faction, with all of the sinister possibilities consequent on machine control, it initiated a movement destined to be crowned with astonishing and gratifying success. At the election held on Monday, June 6, the ticket of the Thompson faction of the Republican party, the organization supposed to be almost impregnably entrenched in power, was defeated by a tremendous majority. Not a single candidate of the twenty which it presented for the circuit bench was chosen, and its choice for the Superior Court, himself a sitting Judge, was also buried under the avalanche of opposition. The issue in the campaign, as sensed by the Chicago Bar Association and by an overwhelming majority of the members of the Lawyers' Association, was simply that of a free and independent judiciary. The coalition ticket, which contained all of the sitting judges except three, who declined a place on it and were persuaded to run on the Thompson ticket, appeared in the Democratic column as a matter of form, but there was no misapprehension anywhere as to the strictly non-partisan character of the issue of the campaign. The nominees on the coalition ticket for the Circuit Court were ten Republicans and ten Democrats. The response of the people to the appeal to put politics out of the judiciary was prompt, enthusiastic and disconcerting to those who had counted on the strength of an organization to overthrow all opposition. Most of the candidates on the coalition ticket won by majorities between 90,000 and 100,000.

SIGNED ARTICLES

As one object of the JOURNAL issued by the American Bar Association is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

A FEW OF THE FUNDAMENTALS OF THE KANSAS INDUSTRIAL COURT ACT

By William L. Huggins, Presiding Judge of the Kansas Court of Industrial Relations and Author of the Bill That Was Enacted as the Kansas Industrial Law

THE Kansas Industrial Act is composed of thirty sections. Perhaps it would not be improper to call it the "Industrial Code." No effort will be made here to analyze all the provisions of the Act, but I will attempt to discuss briefly those sections and parts which seem to be fundamental in their nature. It must be kept in mind that the prime purpose of the Act is the protection of the public against the evils of industrial warfare. Whatever restrictions may be placed upon capital or labor, or whatever powers or prerogatives may be conferred upon either, are incidental to the main purpose.

Section 3a of the law should be very carefully studied by all who desire to become acquainted with the purpose and intent of the legislation. By section 3a the legislature determines and declares certain businesses to be affected with a public interest and therefore subject to supervision by the state as provided in the Act. Technical lawyers have urged that the legislature has not the power or authority to declare any business impressed with a public interest, and that only the courts may place such a burden upon any industry. This point, for the purposes of this article, is conceded. However, in this connection I cannot refrain from calling the attention of the profession to the recent case of Block vs. Hirsh, decided by the United States Supreme Court, April 18, 1921, in which I find the following language:

> But a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect.

The principal object of writing Section 3a into the law was that it might be considered by the courts as a clear indication of the purpose and intent of the legislature in the enactment of the law as a whole. It will be noted that some industries not heretofore regarded as impressed with a public interest are declared to be so affected. If the courts of last resort should hold that, as a matter of law, any one of the industries enumerated in Section 3a is so private in its nature as that it is not affected with a public interest, then the Kansas law, as to that industry, would fail. This principle of public interest is one of the fundamentals upon which the Kansas Industrial Act must depend in the final test. The case of Munn v. People of the State of Illinois (U. S. Supreme Court, 24 Law Ed. p. 77, 94 U. S. 113) is one of the cases which was very carefully studied before the preparation of the first draft of the bill which afterward became the Kansas Industrial Law. Let me call especial attention to the quotation in the Munn Case from Sir Mathew Hale's "De Portibus Maris:"

> A man, for his own private advantage, may in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage, for he doth no more than is lawful for any man to do, viz: makes the most of his own. . . If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the Queen . . . or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the King's license or charter. For now the wharf and crane and other conveniences are effected with a public interest, and they cease to be juris privati only; as if a man set out a street in new building on his own land, it is now no longer bare private interest but is affected by a public interest.[1]

The principle of public interest stated so admirably and so long ago by Sir Mathew Hale is the principle upon which we have builded our entire system of state regulation of common carriers and of public utilities. As public necessity has required it, the legislatures and courts have considered the same principle in relation to the supervision and regulation of other businesses which affect the public as in the case of fire and life insurance, public health regulations, safety appliance acts, workmen's compensation, sanitary regulations in factories and mines, minimum wages for women and children, the prohibition of the employment of children in certain industries, and other matters of similar import. The principle has been extended from time to time as public necessity required it. Today we not only fix the rate which must be charged by common carriers and public utilities, but we prescribe the quality and compel the continuity of their service. As civilization has advanced, as our population has increased, as inventions and industrial developments have changed our living conditions and our customs, we have from time to time, as heretofore indicated, added to the list of businesses and vocations which have been declared by courts to be affected by and with a public interest.

The legislature of the state of Kansas under the Industrial Act has declared by Section 3a that the operation of the businesses of manufacturing or preparing (1) food products, (2) clothing, (3) the mining or production of fuel, (4) the transportation of food products, clothing and fuel, and (5) public utilities and common carriers are affected with a public interest. It will be seen that the legislature has attempted to add to the list of industries formerly regarded by legislatures and courts as affected with a public interest, at least three others, to-wit: the manufacture of food, the manufacture of clothing, and the mining or production of fuel.

I believe the legislature, in the act under discussion, adhered strictly to established principles and was guided by the ancient landmarks of the

1. It is recommended that the Munn Case and the large number of authorities there cited should be studied carefully. See also German Alliance Insurance Company v. Lewis, U. S. Supreme Court, 58 Law Ed., p. 1011, 233 U. S. 389, 34 Sup. Ct. 612, and cases there cited; Budd v. People of New York, U. S. Supreme Court, 36 Law Ed., p. 247, 143 U. S. 517, 12 Sup. Ct. 468, and cases there cited; Julius Block v. Louis Hirsh, U. S. Supreme Court, April 18, 1921, and cases there cited; Marcus Brown Holdings Company v. Marcus Feldman, Benj. Schwartz, et al, U. S. Supreme Court, April 18, 1921, and cases there cited; American Coal Mining Co. v. Special Coal and Food Commission, 268 Fed. 568.

law. Kansas, by legislative enactment, in its early history, declared:

> The common law of England and all statutes and acts of Parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom and not repugnant to or inconsistent with the constitution of the United States and the act entitled "an act to organize the Territory of Nebraska and Kansas" or any statute law which may from time to time be made or passed by this or any subsequent Legislative Assembly of the Territory of Kansas, shall be the rule of action and decision in the Territory, any law, custom or usage to the contrary notwithstanding.[2]

It has been said by eminent American jurists that:

> The common law grew with society, not ahead of it. As society became more complex, and new demands were made upon the law by reason of new circumstances, the courts, originally in England, out of the storehouse of reason and good sense, declared the "common law." But since courts have had in existence in America, they have never hesitated to take upon themselves the responsibility of saying what is the common law.[3]

that:

> The flexibility of the common law consists not in the change of great and essential principles, but in the application of old principles to new cases, and in the modification of the rules flowing from them, to such cases as may arise; so as to preserve the reason of the rule and the spirit of the law.[4]

that:

> The inexhaustible and everchanging complications of human affairs are constantly presenting new questions and new conditions which the law must provide for as they arise; and the law has expansive and adaptive force enough to respond to the demands thus made of it, not by subverting but by forming new combinations and making new applications out of its already established principles.[5]

In the "everchanging complications of human affairs" "new questions" and "new conditions" had arisen prior to January 5, 1920. The legislature of the state of Kansas, in view of these changes, attempted to extend the ancient principles of the common law in order that the public peace, the public health, and the general welfare might be better protected.

Urging again a careful study of the cases heretofore cited and referred to, let me suggest that the public, under modern conditions, is tremendously interested in the manufacture of food and clothing and the production of fuel. These are the three prime necessities of every civilized people. They are more important than transportation, street car service, telephone service, fire insurance, or the storage of grain. They are more important to the general public than the workmen's compensation, minimum wages for women and children, or safety appliances. Under modern conditions the great packing industries of the country, if they have not an absolute monopoly of meat products, have at least a most tremendous influence upon the quality, quantity, and price of this necessary food. The same may be said as to the manufacture of clothing. When it comes to the production of fuel, every home in the land is directly interested. Hundreds of thousands of working people engaged in all manner of industries are dependent upon the supply, not only for household use but for their employment and their wages.

The internal commerce of the country, affecting as it does the very life of the nation itself, depends for its existence upon the efficiency with which the industry of mining and producing fuel is carried on. Of what avail is it to the homes of the land that the channels of commerce be kept open if there be no coal produced to be transported? Of what avail is it that the farmers produce livestock to be transported, if the packing plants be closed and the means of converting live animals into food for human beings be suspended or destroyed? If the government have the power and authority to prescribe rates and other regulations for fire insurance, for the storage of grain, for the carriage of passengers, of the rates to be charged for the transportation of commodities, of the quality and continuity of service in public utilities, and the multitude of regulations which have been thrown around the various businesses which affect the public convenience, can it be said that the government must stand by powerless and see the people reduced to poverty and want because the great business interests owning the coal deposits of the country choose to close down the mines, or because the great packing interests conclude to take a vacation, or because the flour millers are dissatisfied with market conditions and conclude to force the people to meet their requirements by limiting the supply?

Here we are met by the determined objection of some corporations and other employers of labor who brand the law as "a long step toward state socialism." They say that packing houses, flouring mills, sugar mills, cotton and woolen mills, clothing factories, coal mines and oil fields are private industries. They learnedly talk of the ancient Sumptuary Laws of England by which it was attempted to fix the price of almost every commodity in general use and the wages of labor in almost every avocation. These laws failed and the opponents of the Kansas law urge that for the same reasons the Kansas Industrial Law will fail. The same dismal prediction of failure has been made against every law which has been proposed to supervise, regulate, or control common carriers, public utilities, banks and insurance companies. The same prophecy was confidently published by the same class of thinkers in regard to the Bank Guaranty Act, the Blue Sky Law, the Welfare Commission, and the Workmen's Compensation Act in Kansas. I do not care to add to what I have already said as to the nature of the businesses enumerated in Section 3a. They are, in fact and in law, I believe, impressed with a public interest, and therefore they are, as stated in the law,

> subject to supervision by the state as herein provided for the purpose of preventing industrial strife, disorder and waste, and securing the regular and orderly conduct of the businesses directly affecting the living conditions of the people of this state, and in the promotion of the general welfare.

Not only is it urged that some of these businesses are purely private and therefore not subject to any regulation by the state, but it is also claimed that the Kansas law attempts to bring these private industries under the *general* regulatory powers of the state, and thus to treat them as though they were public utilities. I deny that, under the Kan-

2. Laws of Kansas Territory, 1859.
3. Lane v. Spokane etc. Railway Co., 21 Wash. 119.
4. Rensselaer Glass Factory v. Reid, 5 Cow.-N. Y., 587.
5. Woodman v. Pitman, 79 Me. 456.

sas Industrial Law, we have subjected the industries named to the *general* regulatory powers of the state. We have provided for regulation in case of *emergency* only. The law provides that in case a controversy, or other circumstance, arises which may endanger the continuity or efficiency of service, or affect the production or transportation of the necessaries of life, and thereby endanger the public peace or threaten the public health, power and authority is vested in the Court of Industrial Relations[6]. Even the limited supervision which the Court is given over contracts of employment can be exercised only "in any action or proceeding properly before it (the Industrial Court) under the provisions of this Act[7]." Reading this provision in connection with Section 7 of the Act, it will be noted that no proceeding can be properly before the Court of Industrial Relations except in case of a public interest arising by reason of some of the circumstances stated in Section 7. Thus it will be seen that the jurisdiction of the Court of Industrial Relations does not attach except in case of an emergency which threatens the public peace or the public health. The law provides further that the order made by the Court shall be temporary in its nature. It is provided that:

> Said order shall continue for such reasonable time as may be fixed by said Court or until changed by the agreement of the parties with the approval of the Court.[8]

It is therefore plain that even in case of an emergency threatening the public peace or the public health, any order made by the Court is for the temporary purpose only of preventing injury to the public and that when the emergency is passed, the business goes back to its normal condition, the state steps out, and there is no further regulation of the business.

In Section 6, however, it is declared that:

> It is necessary for the public peace, the public health and the general welfare that such businesses shall be operated with reasonable continuity and efficiency in order that the people of this state may live in peace and security and be supplied with the necessaries of life.

To that end it is provided that no person, firm or corporation, or association of persons, shall in any manner or to any extent hinder, delay, limit or suspend such continuous and efficient operation with the intent to evade the purpose and provisions of the law. It is further provided that in case any persons, firm or corporation engaged in any of such businesses may desire to suspend, limit, or cease operations, application may be made to the Industrial Court, and said Court shall hear such application promptly and if it shall be found that the same is made in good faith and is meritorious, authority to limit or cease production shall be granted by order of the Court. There is another provision relating to businesses especially affected by seasons and market conditions, which provides that rules may be made permitting the cessation or limitation of such businesses when necessity may require it[9].

The law is intended to protect the public. That intent is so apparent that it cannot be misunderstood. It is the police power of the state which is invoked. Personally, I believe that every provision of the Kansas Industrial Act is within the police power of the state in the narrower sense of that term, but taking the more comprehensive definition of the term "police power," I am satisfied there can be no question in the matter[10].

No power is granted to the Court of Industrial Relations to interfere except in case of such an emergency as makes it necessary that the state step in to protect the public. In case of a great public emergency the law grants power to the state to take over the business. It is provided that:

> In case of the suspension, limitation, or cessation of the operation of any such industry, if it shall appear to the Court of Industrial Relations that such suspension, limitation, or cessation will *seriously affect the public welfare* by endangering the public peace or threatening the public health, then the Court is authorized and directed to take over, control, direct and operate said industry *during such emergency.*

There is a provision further, however, that a fair return and compensation shall be paid to the owners of such industry, and a fair wage to the workers engaged therein during such state operation. During the emergency of the World War, the Government of the United States, by act of Congress, did precisely what is provided may be done by Section 20 of the Kansas Industrial Law in case of an emergency. The Government took over the railroads, operated them, paid the expenses out of the Federal Treasury, collected the revenues, guaranteed a fair return to the owners, paid that out of the Federal Treasury; and when the emergency had passed, handed the roads back to the owners. Was that "state socialism"?

Still further applying old legal principles to new circumstances and conditions, the Kansas legislature, under Section 3b, declares that:

> Any person, firm or corporation engaged in any such industry or employment, or in the operation of such public utilities or common carriers within the state of Kansas, either in the capacity of owner, officer, or worker, shall be subject to the provisions of this act.

This declaration seeks not only to impress capital invested in these essential industries with a public interest, but it also declares that labor engaged therein is impressed with a public interest and that it owes a public duty. The law-making body, under Section 3b, recognized the fact that the public interest is affected by the limitation or suspension of such essential industries in the same degree when that limitation or suspension is effected by labor and when it is effected by capital. Of what avail is it that a corporation owning and operating a railroad be regulated by law and required to furnish service of a proper quality and continuity, if, in the exercise of the alleged and pretended inalienable right of the laborers to strike and by conspiracy, by duress, or by intimidation to prevent others from working, the entire service may be suspended and the public left to suffer the inconvenience and hardship resulting from such suspension? Why regulate one half and leave the other unregulated? What right has labor engaged in these essential industries to freeze or starve the public by the strike, which capital might not claim by the lockout or by suspension of the business? When citizens of a central Kansas town find their

6. See Section 7, Kansas Industrial Law.
7. See Section 9, Kansas Industrial Law.
8. See Section 8, Kansas Industrial Law.
9. See opinion of Industrial Court, Docket 2803, Millers Case.

10. See Bacon v. Walker, 204 U. S. 311, 51 L. Ed. 499, 27 Sup. Ct. 289; Muller v. Oregon, 208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. 324; Central Lumber Co. v. S. Dak., 226 U. S. 157; Holden v. Hardy, 169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. 383; Dakota Central Telephone Co. v. S. Dak. ex rel Payne, U. S. Sup. Ct., 63 Law Ed., p. 910, 250 U. S. 163, 39 Sup. Ct. 507.
11. Section 20, Kansas Industrial Act.

public utilities forced to shut down and their homes left cold by reason of a shortage of fuel, what is the difference whether that shortage of fuel is caused by the refusal of the owners of the mine to produce coal or by the refusal of the miners to work or to permit others to work? If governments have the right under the police power to protect the health and general welfare of the public, does not that power extend to labor as well as to capital?

Under the provisions of the Kansas Industrial law men who invest their capital in the essential industries and men who engage themselves as workers therein are placed upon an absolute equality. The law does not undertake to compel any man to invest his money in any of the essential industries. He is perfectly free to choose his own investment. The law does not attempt to compel any man to engage as a worker in any of the essential industries. He is absolutely free to choose his own employment. The law does say to the investor, "If you invest your money in any of these essential industries, you must submit to such regulation as is necessary in the protection of the public." The law does say to the laborer, "If you engage yourself as a worker in any of these essential industries, you must submit to such regulation as is necessary in the protection of the public." The law does say to the investor in the essential industries, "If you are not satisfied with the regulation which the state exercises over the industry, you may change your investment. All you have to do is to find a purchaser for your stock or your interest therein." The law does say to the laborer engaged in the essential industries, "If you are not satisfied with the regulation which the state exercises over the industry, you may change your occupation at any time; all you have to do is to find another job." The state by the Industrial law says to the investor and to the laborer alike, "The public has an interest in the business in which you are engaged because you are producing or transporting the necessaries of life. Therefore you shall not engage in a private quarrel which will either temporarily or permanently destroy the business in which the public is so vitally interested. The state will provide you with a means and with instrumentalities by which you may adjudicate your controversies, but in no event shall you invade the public's right to food, to clothing, to fuel, and to public service."

This brings us to the question as to whether the industrial controversy is, or is not, subject to adjudication. The Kansas Industrial law provides for the adjudication of industrial disputes in very much the same way that other classes of controversies have been adjudicated in all the Anglo-Saxon countries of the world for hundreds of years. We accept without question the authority and jurisdiction of our courts to adjudicate matters affecting the life, the liberty and the property of the citizen. A man commits a capital crime. He is found guilty by a jury of his peers. He is hanged because of the judgment and sentence of a court. The liberty of the individual is subject to adjudication and there is a great variety of crimes for the commission of any one of which he may be placed in jail or in the penitentiary. Every dollar's worth of property which he possesses may be taken away from him by the adjudication of a court. His domestic relations are subject to adjudication. Even his children may be taken away from him under the juvenile laws of the land.

If a man's right to live be justiciable, if his liberty may be taken away from him by the judgment of a court, if all his property may be subjected to the claims of his creditors by a civil judgment, if his domestic relations be subject to adjudication, surely then such prosaic matters as hours of labor, working conditions, and wages are also matters which may be adjudicated. But the Kansas law does not make the industrial controversy subject to adjudication except in case of the public interest. It is only when by reason of circumstances arising out of the controversy, the party of the third part—the general public—acquires an interest, that the state steps in. In the public interest and in the public interest only may the courts adjudicate and settle the industrial controversy.

The Kansas legislature, in its effort to protect the public against the evils of industrial warfare, in Section 3b of the Industrial law, declares that employees as well as employers, workers as well an investors, in the essential industries shall be subject to the provisions of the Industrial Act. In Section 6 the legislature declares that it is necessary for the public peace, health and general welfare that these industries shall be operated with reasonable continuity and efficiency, and that therefore no person, firm, corporation, or association of persons shall in any manner wilfully hinder, delay, limit or suspend such continuous and efficient operation for the purpose of evading the provisions of the Act. In Section 17 the legislature declares it to be unlawful for any person, firm or corporation, or for any association of persons to hinder, delay, limit, or suspend such continuous and efficient operations. Section 17 also provides that there shall be no restriction upon the right of any individual to quit his employment at any time, but specifically prohibits any person from conspiring with, or inducing, others to quit their employment for the purpose of hindering, delaying, interfering with, or suspending the operations of any such industries; and it further specifically prohibits picketing, or intimidation by threats or abuse, with the intent to induce others to quit their employment or from accepting employment or from remaining in the employ of any of the industries named.

These restrictions upon labor have been denounced in unmeasured terms by a number of the governing officials of labor organizations. The condemnation of the Kansas Industrial law by these representatives of labor would, I believe, be fully justified if the law had stopped after making these restrictions and had given in compensation therefor no remedial rights. Alongside of these restrictive measures should be noted the fact that there has been created an impartial tribunal into which labor may go at any time without cost and may have its grievances and controversies with employers investigated and adjudicated. The Kansas law substitutes for the strike, the boycott, duress, intimidation and violence in industrial disputes, the orderly processes of a civil tribunal. The Court of Industrial Relations has the power

and jurisdiction to summon all necessary parties before it, to take the testimony of witnesses, to investigate all conditions affecting the industry, and, when necessary in the protection of the public interest, to order such changes as may be necessary in the matter of working and living conditions, hours of labor, rules and practices, and a reasonable minimum wage or standard of wages[12].

At this point we meet violent opposition from both organizations,—the organized employers and the organized workers,—who in unison declare that no human tribunal can fix a wage at which labor must work or which the employer must pay, and labor adds that no human tribunal can prohibit workers from striking in order to procure justice from their employers. Yet that, in substance and within certain limitations, is what we are undertaking to do in Kansas. We are not without judicial authority, although I must admit that we have little enough precedent to guide us. In the case of In re Debs (158 U. S. 564, 39 Law Ed. 1092, 15 Sup. Ct. 900), Justice Brewer delivered the opinion and with his usual clarity of thought and felicity of expression stated the principles of law which very largely influenced and guided in the framing of the Kansas Industrial Act. Space forbids my discussing this case in any detail. Suffice it to say that in my view of the matter, the power of Congress to regulate interstate and foreign commerce and commerce with the Indian tribes is a part of the police power which formerly belonged to the states but which, upon the adoption of the Federal Constitution, was surrendered to the National government. Therefore, there seems to be a close analogy between the Debs case and cases which might arise under the Kansas Industrial Act. Justice Brewer in the opinion makes the following statement:

> The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws.

The learned justice in the Debs case was considering the question of a great strike among the employees of the railroads entering Chicago. In another place in the opinion he uses this expression:

> The forcible interference with that commerce; *the attempted exercise by individuals of powers belonging only to government*, and the threatened continuance of such invasions of public rights, presented a condition of affairs which called for the fullest exercise of all the powers of the courts. (The italics are ours.)

In another part of the opinion Justice Brewer says:

> Doubtless, it is within the competency of Congress to prescribe by legislation that any interferences with these matters shall be *offenses against the United States, and prosecuted and punished by indictment in the proper courts.*[13] (The italics are ours.)

Again, in the case of Wilson v. New (243 U. S. 332, 61 Law Ed. 755, 37 Sup. Ct. 298) the question of the rights of the public, the authority of the government, and the rights and duties of employers and employees were considered. In Wilson v. New the court considered the constitutionality of the Adamson Law, so-called. This case was also carefully studied in the framing of the Kansas Industrial Act. It is my belief that in everything, except possibly its penal sections, the Kansas Industrial Act is strictly within the principles of law laid down by Chief Justice White in the prevailing opinion in Wilson v. New. In that case the power of Congress to enact such legislation was challenged. But the prevailing opinion unmistakably upholds such power when the country may be confronted with an emergency which threatens the public. In the prevailing opinion it is stated:

> Further yet, what benefits would flow to society by recognizing the right because of the public interest to regulate the relation of employer and employee and of the employees among themselves, and to give to the latter peculiar and spcial rights, safeguarding their persons, protecting them in case of accident, and giving efficient remedies for that purpose, if there were no power to remedy a situation created by a dispute between employers and employees as to the rate of wages, which, if not remedied *would leave the public helpless, the whole people ruined and all the homes of the land submitted to a danger of the most serious character?* . . . We are of opinion that the reasons stated conclusively establish that, from the point of view of inherent power, the Act which is before us (the Adamson Law) was clearly within the legislative power of Congress to adopt, and that, in substance and effect, it amounted to an exertion of its authority under the circumstances disclosed to compulsorily arbitrate a dispute between the parties by establishing as to the subject matter of *that dispute* a legislative standard of wages operative and binding as a matter of law upon the parties,—a power none the less efficaciously exerted because exercised by direct legislative act instead of by the enactment of *other and appropriate means providing for the bringing about of such results.* (The italics are ours.)

Space forbids further discussion of Wilson v. New but I suggest that a study of those portions of the brief of Solicitor General Davis and others which are set out in U. S. Supreme Court Rep., 61 Law Ed. beginning on page 756 will greatly assist any lawyer who desires to make a thorough study of the questions discussed in the opinion. To my mind there is significance in the language used by the Chief Justice above quoted: "Other and appropriate means providing for the bringing about of such results." Read in connection with the context, these words seem to point to the establishment, by legislative act, of some tribunal clothed with authority to adjust and regulate such conditions as they might occur from time to time. The present Federal Railroad Labor Board is at least somewhat in line with the suggestion of the Chief Justice.

Ample support for the fundamental principles of the Kansas Industrial Act are: (1) Sir Mathew Hale's statement of the public's interest, made 260 years ago; (2) the application of that ancient principle to more modern conditions by Chief Justice Waite in 1877 in Munn v. People of Illinois; (3) Justice Brewer's clear statement, in 1895, of the law with regard to the power of courts and legislatures to protect the public and to penalize "the attempted exercise by individuals of powers belonging only to government," in re Debs; and (4) Chief Justice White's strong statement, in 1916, upholding the right of Congress by legislation, in case of a great public emergency, to fix

12. Sections 7 and 8, Kansas Industrial Law.
13. See also Duplex Printing Co. v. Deering, — U. S. —, 65 Law Ed. —, 41 Sup. Ct. 172.

a permanent standard working day and establish temporary wage regulations for employees engaged in operating railway trains in interstate commerce.

By the Industrial Act we are attempting such regulation of all businesses which are affected with a public interest as is necessary to protect the public, as suggested by Sir Mathew Hale and Chief Justice Waite. In so doing we are forbidding "the exercise by individuals of powers belonging only to government." We are making interference with such businesses *offenses against the state of Kansas to be prosecuted and punished in the criminal courts of the state,* as suggested by Justice Brewer in re Debs; and we have by this enactment provided "other and appropriate means providing for the bringing about of such results," as suggested by Chief Justice White in Wilson v. New.

I fully realize that I have herein touched only the rough edges of the Kansas Industrial Law. There are many other very interesting and important matters to be discussed. It is impossible thoroughly to discuss an act of this kind within the limits of such an article. The impression seems to be prevalent that the law was hastily enacted. This impression, in conclusion, I want to remove. The Kansas Industrial Act is not an example of hasty legislation. It has been in contemplation and has been given much study running over a period of ten years. More than seven years before its enactment by the Kansas legislature, the fundamental legal principles of the present act were stated in a public address to a civic body. In the month of October, 1919, every feature of the present law was concretely stated in a public discourse at a Rotary Club luncheon.

The following November, the great coal strike began. This strike was made the occasion for the calling of a special session of the legislature. This was the occasion but not the cause of the preparation and enactment of the law as it now stands. The bill was drafted with painstaking care using the Rotary speech of the month before as an outline. After a careful preparation of the first draft of the bill, it was presented for criticism to a number of prominent lawyers of our state. It was placed in the hands of members of the two Houses of the legislature and was introduced simultaneously as Bill No. 1 in each house. The House of Representatives went into committee of the whole, invited in the Senate and held public discussions for a period of about one week. The opponents, as well as the advocates of the measure addressed the committee. The judiciary committee of the State Senate, composed of some of the brightest lawyers of the state, had the bill under constant consideration, sitting for nine consecutive days. Many changes in verbiage were made and the bill was greatly improved by these various criticisms, conferences, discussions and considerations; but none of the fundamental features were eliminated or materially changed. The law today in all essential respects is as it was originally drafted and introduced into the two houses. It is our best effort toward legislation of this kind. It may have many faults and weaknesses, but such are not the results of haste in the preparation or the passage of the Act.

THE ARGUMENT IN THE DECISION

By JAMES E. MARKHAM
*Assistant Attorney General of Minnesota**

RECENT events have brought into the foreground of discussion the question whether it is wise and desirable that the practice of our appellate courts in writing into their decisions elaborate statements of facts and extended discussion of precedents and authorities leading to the conclusion reached be encouraged, or whether, to an extent that the advice of the bar is to be welcomed, there be urged the elimination of argument and a greatly curtailed discussion of authorities.

The rapid multiplication of decisions and citation of precedents is indicated by a glance at the statistics. During the five-year period ending in 1913, 65,379 decisions were written by our appellate courts, of which 1,061 were promulgated by the supreme court of the United States. Excluding advance sheets and reports, the total number of pages of decisions reached 175,000 a year, while the average number of pages in the English reports during this period was about 5,000 pages a year. I have not at hand the details for the succeeding five-year term, but a competent editor of law books and reports, in an address delivered a year ago, places the annual output at above 20,000 decisions and reports that, during the period of twenty years ending in 1914, the length of the average opinion increased substantially thirty per cent, and in some jurisdictions fifty per cent. The figures for the year 1919 show that there were 22,000 decisions in round numbers announced by our appellate courts for the information of the other courts and the bar, and it is fair to assume that the number of these decisions rendered during the present year will reach at least 25,000. "Surely, of the making of many books there is no end, and much study is weariness of the flesh." These decisions, at a conservative estimate, represent the presentation of 80,000 precedents, considered by the courts as bearing upon the conclusions reached.

One side of the question is forcibly stated in the application filed for a re-argument of the case in which the Supreme Court of the United States sustained the war-time prohibition amendment and the act of congress referred to as the "Volstead Act," adopted for the purpose of enforcement of the amendment, and in which the prevailing opinion merely declared the conclusions at which the court had arrived, without elaboration of the argument on which the conclusions were found. (Rhode Island vs. Palmer, Attorney-General, 40 Sup. Ct. Rep. 486.)

The application for reargument, to which I have directed your attention (recently filed by two distin-

*Extracts from an address delivered to Association of Attorneys General at St. Louis, Aug. 24, 1920.

guished members of the bar—Elihu Root and William D. Guthrie, representing the losing side in that controversy) decries the innovation, the decision of important constitutional questions and questions involving the construction to be placed upon an act of congress, without the citation of precedents and without argument to sustain the conclusions.

Against the very able argument made by distinguished counsel in support of this application is the array, the startling array, of figures giving the number of pages and the number of volumes necessary to record the decisions of our appellate courts, state and nation. These decisions include, as the examination discloses, the citation of some 80,000 precedents, added to the already existing number of precedents, in the brief space of five years, 860 additional volumes, demanding and receiving shelf room in our law libraries during a single period of five years, and this during the infancy of the nation's jurisprudence.

Thus, looking ahead a half century to the time when there shall be many times the number of inhabitants within our borders, and a corresponding increase in the number of our litigants, and in the number of our appellate courts, what may we expect if the present rate of production of precedents be maintained?

As stated by Chief Justice Winslow, of the Supreme Court of Wisconsin, in an article on the subject:

> The law library of the future staggers the imagination as one thinks of the countless multiude of shelves that will stretch away in the dim distance, all loaded with their many volumes of precious precedents; and as one thinks of the intellectual giant that will be competent to retain a knowledge of them, as well as of the judge that must pass upon the principles involved, one must believe they need be supermen, indeed.

Another writer, discussing this subject, has said:

> Viewing the matter not relatively, but absolutely, it is plain that the time is passed when a man can, by putting out a little more and wearing a little more of his energy, keep up with the annual outpour. The mass of the annual legal product is so great that it will break the back of any man that tries to carry it; however conscientious he may be in self-preservation, he simply must stand from under it.

It would seem that the middle ground between no argument in a decision and no citation of authority in support of the conclusions reached and the elaborate discussion of questions of law presented is one that should receive our support and our commendation. I believe there should be a shortening of briefs and a condensation and increasing brevity of the argument and elucidation of the court in its decisions.

The judge announcing the decision, as it seems to me, should confine himself to the actual questions presented and, in deciding them, his aim should be to treat them as briefly as possible consistent with clearness and certainty. It may be conceded that it is more difficult to write such opinions in the long run, but that the result amply justifies the extra labor may not be doubted.

In a report of a special committee on reports and digests presented to the American Bar Association at Chicago, on August 30, 1916, there are various recommendations along the lines suggested. In this report it is stated that the consensus of opinion seems to be that the opinions of the court are too long.

We all recognize there are cases when it is necessary to trace the history of the law applicable to new or unusual facts and that, in such cases, a long opinion may be advisable, and in rare instances necessary. In my own state we have a statute that requires the court to file an opinion in every case decided, with a brief statement of the conclusions reached, and I am advised that the same statutory provisions obtain in the laws of some of the other states. But the citation of long lists of cases in support of perhaps well-settled doctrine is as useless, I submit, as it is frequent. Long quotations from other opinions seldom add anything to the value of the decision and merely pad the report.

Let us urge that when required to state the case in showing the application of the legal principles involved, only the ultimate facts necessary to a complete understanding of the case should be stated. It sometimes happens that the writer of an opinion makes a statement of the evidence, from which he evolves, as he goes along, the facts upon which the decision must be based. This has been called "tinkering with the typewriter," and it increases the length of the opinion very materially. Generally, it is the length of the opinion that causes the large volume of citation and the large amount of space required for its publication.

Where the pressure of the work is the greatest, the opinions are frequently the longest. The judges are tempted to give way to extensive citations from the reports of other decisions, sometimes to the extent that their decisions are confused and the reasons for the conclusions reached are lost in the abyss of argument and citations.

It has been suggested, and apparently with justice, that the case system of legal education is responsible for the eager search for precedents in point, and when, in the course of time, the lawyers themselves so trained become judges of the courts of last resort, the opinions will reflect, more and more, a ceaseless collection of precedents, while others will express the view with keenness of analysis, tending to a disuse of precedents, because of a better understanding of them.

It is submitted, however, in conclusion, that, in the effort to shorten the opinions, the lawyers must assist the courts by shortening their briefs; only the issues involved should be in the brief, and the points suggested should be raised in the most concise manner. Such briefs will materially aid the court in the writing of shorter and better opinions, and the court should be respectfully requested to give encouragement to these considerations in the preparation of their opinions. The courts have it in their power to apply the remedy by more concise expressions.

As already indicated, it is my own view at which I have arrived after an experience at the bar of a longer period of time than I like to mention, that the courts should confine their decisions, as far as the circumstances will permit, to the briefest possible statement of facts and that there should be included in the decision only such necessary argument and citation as shall make clear the questions of law presented and the conclusions reached. While clarity of statement is always desirable, yet it matters not so much whether the periods of the opinion are well rounded, the sentences carefully and grammatically constructed, and the style correct; the litigants are interested in the words "affirmed" or "reversed," which appear at the close of the opinion, and the bar and the public in having the questions clearly stated and clearly decided.

EDWARD DOUGLASS WHITE

LATE CHIEF JUSTICE UNITED STATES SUPREME COURT

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EDWARD DOUGLASS WHITE

"This is of the past in barest outline—what of the future? Anticipating it I see no shadow on his fame, no lessening of his example nor of the impression his life and services have made upon the country. I venture comparisons. I make full concession of the recognized and illustrious merit of those who have preceded him. I make full admission, in assured prophecy, of the abilities of those who will succeed him, yet, considering his qualities and their exercises, I dare to say that, as he has attained he will forever keep a distinct eminence among the Chief Justices of these United States."—From Associate Justice McKenna's tribute from the bench, May 31, 1921.

FOR some time before the death of Chief Justice White there had been rumors of his impending retirement; but no one anticipated that a more august summons to repose was soon to come. The announcement of his death on May 19, following an operation, came as a distinct shock to the nation. Obviously a life so full of achievement, a character of such outstanding qualities, and an influence so significant in its important field demand a seasoned and adequate review, for which time and mature consideration are required. It is with satisfaction that the JOURNAL is able to announce that Honorable John W. Davis, former Solicitor General and former Ambassador to Great Britain, has consented to prepare an article on the late Chief Justice White, which will appear, we trust, in an early issue. The present article is simply such notice as the passing of so eminent a jurist and citizen immediately demands.

At this moment, with the impression of his splendid and consistent career strong upon us, it seems that he could hardly have been anything save a judge, and a great judge. But a brief glance at that career shows how many unusual elements of chance there were in the process which conducted him to the position for which he was so fitted. Who, for instance, could have imagined that an ex-Confederate soldier would come to be the Chief Justice of the nation's highest tribunal? Who could have forecast the political impasse which caused President Cleveland to abandon his insistence on the appointment of a New York Democrat to an Associate Justiceship of the U. S. Supreme Court and to nominate a member of the Senate for the place? Who would have ventured to prophesy that a Republican President would brush aside precedents and name not only an Associate Justice, but a member of the Democratic party for the highest judicial position in the country and the world? And yet all of these unusual things happened in the career of the late Chief Justice and without them that career would not have been so rounded and useful as it was. Truly, destiny does seem occasionally, in spite of all of the probabilities, to conduct the man to the one place in which he is capable of finding the noblest exercise of his powers and the greatest opportunity for usefulness to his country. And so well recognized were his character and ability that at none of these unusual stages of his career was there any criticism worth considering.

But if chance co-operated in bringing him to high place, once arrived there, he signally vindicated his selection. It is not the purpose of this article to consider his judicial services in detail. It is enough to say that during his long career on the bench of the U. S. Supreme Court he rendered a number of opinions of monumental importance during a period which will assuredly be recognized as one of the most significant in our country's history. It was the period of our emergence to a more commanding position in world-affairs and of our assumption of responsibilities beyond the seas. It was preeminently a period during which the great economic forces that had been gathering head for years developed and assumed aspects which inspired legislation and called for frequent judicial decisions as to the lines between legality and illegality; a period of struggle between these forces and, for many, one of gradually changing conceptions as to many objects of national concern; one in which the question of governmental control of the great processes of transportation and business assumed growing importance. In brief, a period to test even the capacity of such an able tribunal as the U. S. Supreme Court, for these tremendous issues, in one form or another, inevitably came before it for consideration. And in the long series of decisions in which that court dealt with these numerous and complex problems the late Chief Justice played a great and significant part. To discuss his opinions here would be to trespass on the field assigned to the distinguished lawyer who argued many of the most important cases in which those opinions were delivered.

Born in Lafourche Parish, La., Nov. 3, 1845, the late Chief Justice inherited all the traditions of his state and section. His father was a Tennesseean who emigrated to Louisiana, occupied judicial positions and served in Congress and as Governor. The son was educated in Catholic institutions: Mt. Ste. Mary, near Emmitsburg, Md., the Jesuit College in New Orleans, and Georgetown College, Washington, D. C. At the outbreak of the war the boy of sixteen enlisted in the Confederate army and served until July 6, 1863, when he was captured by Union troops at Port Hudson. He was released only a short time before the end of the war. After the conflict he studied law in the office of Chief Justice Bermudez at New Orleans, and in 1868 was admitted to the Bar.

From that time his career is for years interwoven with the history of his State. He entered politics almost inevitably; during "reconstruction"

almost everybody in a Southern state had to be more or less in politics, which was for a time, at least, the supreme concern. In 1872 he was elected to the State Senate for four years, and he was active in the events of succeeding years which led to the restoration of Democratic control in Louisiana. Governor Nicholls, who was elected in 1876, appointed him Associate Justice of the Supreme Court, a position that he held until 1879, when he resumed the practice of law. In addition to law, he was for some time interested in sugar planting. He was an uncompromising opponent of the Louisiana State Lottery and stumped the state against it. In the campaign which resulted in the election of Gov. Nicholls over Governor McEnery he managed the affairs of the former with marked ability. When the legislature met in 1888, he was elected to the U. S. Senate.

Henceforth his abilities were to find recognition in the wider national field. He soon became one of the outstanding Senate figures on the Democratic side. He made a decided impression on that body by his argument against the constitutionality of the anti-option measure. He supported President Cleveland's views during the struggle over the repeal of the purchasing clause of the Sherman Act and sided with him in opposing the annexation of Hawaii. The very interesting circumstances of his appointment as Associate Justice of the Supreme Court are generally familiar. The Senate rejected President Cleveland's successive nominations of two New York men but promptly confirmed the nomination of one of its own members, the then Senator White, without even the customary reference to a committee. This appointment came on February 19, 1894. On December 12, 1910 President Taft, who knew and admired his record as Associate Justice, broke all precedents and named him Chief Justice.

He was married early in November, 1894, to Mrs. Kent of Washington, who survives him. His remains rest in Oak Hill cemetery at Washington, where he was interred with simple ceremonies, after a service at the church attended by President and Mrs. Harding, members of the Supreme Court, members of the Cabinet, representatives of the House and Senate, foreign diplomats and other notables.

PUBLIC DUTIES OF THE AMERICAN LAWYER

Address of the Late Chief Justice Edward D. White of the United States Supreme Court at the Annual Dinner of the American Bar Association, Sept. 5, 1919.

MR. PRESIDENT: It is a privilege to be with you tonight, a participant in this annual banquet, but it is a pleasure not without its pang, for as I look upon those who are here assembled, ah, me! I cannot but be conscious of how many who participated in the last annual meeting and banquet which I attended, and to whom I was bound by ties of respect and affection, are not visible in the material sense, they are not absent in to eternity. The pulling at the heart strings which the consciousness of this fact brings is, however, assuaged by the conviction that they have gone to their reward and that, although they may not be visible in the material sense they are not absent in the true sense, since the duty which they owed to their fellow-countrymen as lawyers has devolved upon and is being carried out by their brethren who are physically here.

The thought is aptly illustrated by the maxim of the ancient French law, "Le mort saisit le vif," which, as applied to our profession and to its public responsibilities, teaches the eternity of duty and the ever-living endurance of the obligations of our profession to preserve human liberty and perpetuate free and representative government. I say, Mr. President, our profession, because, although it happens that the line of my duty for many years has been judicial, that fact, instead of weakening, has strengthened the ties which make me one of the profession and has caused me to feel more and more every day of my life the indispensable unity which makes the Bench and Bar one and indivisible in the accomplishment of the great responsibilities which rest upon them. What are the public duties which rest upon the members of our profession and how may those duties, in a general sense, best be performed, are the subjects to which I intend to refer in the most cursory way.

Undoubtedly our forefathers sought by the government which they created to save us from the misery and anguish which had, as a necessary consequence, ever resulted from the despotism of the one over the many or the tyranny of the many over the few. To this end their purpose was to make human freedom perpetual by guaranteeing the great rights of life, liberty and property to each and every individual and thus secure those precious blessings to all under the free and representative government which they established.

To accomplish these objects the constitutional structure which they erected had a duplex character, national on the one hand and state on the other, each designed to move in its respective sphere of action without interfering with the powers of the other, both being restrained by the fundamental guarantees or prohibitions which were ordained to prevent the abuse of the powers which were recognized or granted and to confine their operation in their appropriate area.

Simple and resourceful as were the institutions thus provided, it is apparent that standing alone they are wholly inefficacious because they were without ultimate sanction, that is, without any regulating power having authority to restrain wrongful or mistaken exertions of the powers given, and thereby to prevent the crash and confusion which would necessarily be the consequence of mistake or error in their exercise.

It is, I submit, further not to be doubted that the Fathers, contemplating this situation, determined to provide a remedy for it. Seeking to accomplish that result and bringing into mind the

traditions of our race as to the benefactions which had come to it from the wisdom, the courage, the fidelity, the integrity and the restraint by which the law of the land had been administered through lawyers and courts, they made that law as construed and applied by the courts in justiciable controversies the final sanction by which the powers conferred were in the ultimate sense to be tested when called into play. How simple and yet how remarkable was the conclusion thus adopted!—a conclusion which today challenges the admiration of the world and stands virtually as the abiding hope for the protection of individual right and the perpetuation of free government.

Who can say that the Fathers were mistaken in the face of this mighty nation which has developed under the institutions which they thus created? Who can say that the transcendent result of their work thus demonstrated was not in a vast measure secured by the sanction of judicial power which the Fathers adopted when what may be truly called that "remarkable and comprehensive code of international law" is taken into view by which, as the result of justiciable controversies culminating in judicial decisions, the principles of the Constitution have been defined to the end that the governments, both national and state, have been able to discharge their great duties each secured from unwarrantable interference the one with the other?

While it is true that the causes which antedated the Constitution and which served to provoke the awful struggle of the Civil War proved uncontrollable by the legal sanctions which the Constitution contemplated, the potentiality which those sanctions embodied and their wonderful efficiency and power stand demonstrated, not only by what I have previously said, but by the power which their application produced on the results of that war, and the complete obliteration which their exercise served to bring about of all the evil consequences to the state and nation which otherwise would have arisen and, in all human probability, have detrimentally operated upon our national life, at least for a long period of time. It is not only the marvel of the result thus stated which challenges our attention but the simplicity of the means by which it was accomplished, that is, the announcements of one judicial decision after another concerning individual rights by which the difference between peace and war was demarked and the country was led again into the home of the Fathers, sheltered by the rights and limitations which the Constitution provided. Indeed, so completely was this accomplished that, not only were the wounds occasioned by the Civil War fully healed, but the minds of all were turned away from the bitterness and conflicts of the past to the great and perfect rights which were enjoyed.

How better can the complete bringing about of these conditions be shown than by considering those mighty forces which on land and sea, for the protection of the individual right of the American citizens and for the punishment of foul and dastardly wrongs committed upon them and for the protection and extension of democracy through the instrumentality of representative and free government, have by their valor and their heroism just brought the war to so triumphant a conclusion? Yes, how more particularly can the oblivion of every rancor dependent on the Civil War be demonstrated than by observing that on every field from the plains of Flanders to the far-off hills, in those plains, in the valley of the Meuse, in the Champagne, in the Argonne, with a valor and heroism never exceeded, the sons of New England and of all the Atlantic Seaboard states, those stretching from there to the Pacific, and of all the Southern states,—in short, of every state, stood shoulder to shoulder in line of battle, and that those who so gloriously gave up their lives lie side by side where they fell?

Why should it, when these things are considered, be far-fetched to say that if we had power this night to raise to life the lines of conflicting forces where they fell along the fateful heights of Gettysburg or anywhere else in the combats of the Civil War, they would not be enemies one to the other but brethren, rejoicing in the glory and honor and strength of the nation which the Fathers created.

Yes, my brethren, it must be recognized from what I have said that the American Lawyer, from the public point of view, is especially dedicated to the preservation of human liberty and upon him and the faithful discharge of his duties rests the hope of all the ages for its perpetuation. Ah! let us recognize this great truth and let us resolve the more and more, as we go about the daily affairs of our lives, to carry it in our minds and hearts in order more fully to meet the great responsibilities which rest upon us. Let its consciousness admonish us to put aside the fallacious suggestion that the Constitution has outlived its usefulness, that the country has outgrown the restraints which the Constitution creates, that as individual right is inimical to progress and liberty and a free government, such right should be destroyed, to be replaced by some strange combination of the many to the obliteration of all individual freedom.

I know that at this particular juncture the dislocations produced by the great war through which we have passed, the cost of high living, the diminution of production and other interferences with the law of supply and demand necessarily consequent on the war have brought about an ephemeral condition as to the high cost of living which affords a fertile field for all sorts of chimerical suggestions, which substantially assume the impotency of free government and the necessity for overthrowing it. Yes, I know further it is true to say that if the bountiful crop of demagoguery and of absolutely frivolous suggestions which this situation has stimulated be too seriously considered, fear for our free institutions may be engendered. But such fear can only be momentary if the great body of American freemen be brought into account. How can it be otherwise when we recall the millions of our fellow citizens who love their country, who appreciate the blessings which the individual liberty and representative government give, and are fixed in their purpose to perpetuate them? How can it be possible to feel the slightest doubt on this subject if additionally we bring before our minds, by way of illustration, some of the subjects which are embraced in the general considerations I have just referred to, that is, of the homes of all our land, of the churches in which the prayers of such a multitude of our people go up for blessings on our country, and of the

great body of men who by land and sea have so recently made it glorious by their splendid courage and self-sacrificing discharge of duty?

While these considerations of the present situation afford instant certainty, I must confess that sometimes, as my thoughts turn to the future and the vast probable increase in our population, to the infinite opportunity which liberty affords to those who misguidedly or with intentional wrong preach the destruction of our institutions under the guise of preserving freedom, a great dread comes to me that possibly some day in the future the forces of evil, of anarchy and of wrong may gather such momentum as to enable them to overthrow directly or indirectly the constitutional institutions which the Fathers gave us and thus deprive us of those blessings which have come from their possession. But this pessimism is also only momentary for, lo! as I strain my vision to the dawn of the generations which are to come my heart rises with exaltation and gratitude because it is given to me to see an advancing force full of love for individual liberty and free government and fixed in the purpose to perpetuate them. Ah! as I look at its noble array, confidence in the future becomes assured and I cannot but exclaim: "All hail, the American lawyer of the generations which are to follow! Come! Come in your allotted time so that individual liberty may endure, representative government be perpetuated and the only safe and peaceful highway for the advance of democracy in its true sense be made certain!"

Proposed Amendments to Constitution and By-Laws

I

Amendment proposed by Reginald Heber Smith, Chairman of the Special Committee on Legal Aid, which is given as one of the recommendations in the report of his Committee to be submitted at the 1921 meeting:

That there be a standing committee on Legal Aid work, and to that end that Article IV of the Constitution, in the fifth paragraph thereof, be amended by adding after the words "On Noteworthy Changes in Statute Law" the words "On Legal Aid Work."

II

Amendment proposed by Judge George T. Page of Chicago. Amend Article VI, title "Dues" so as to read as follows:

Each member shall pay to the Treasurer annually such dues—which shall include the Journal subscription—as shall be fixed from time to time by resolution of the Executive Committee. All other publications of the Association shall be free of charge to the members. No person shall be in good standing or qualified to exercise any privilege of membership who is in default. The Executive Committee, in its discretion, may remit the dues of any member under special circumstances.

III

Amendments proposed by Thomas C. McClellan, member of the Executive Committee:

1. Amend that part of Article IV of the Constitution, providing for a General Council, to read as follows:

A General Council, consisting of one member from each state, to be annually nominated during the month of May, for election by the Association at its next annual meeting, by the members resident of the respective states, by mail ballot, in the manner prescribed in By-Law XIII. Upon the failure of the resident members of any state to nominate a member of the General Council, or upon the failure of the person so nominated to attend the annual meeting of the Association, the members from such state attending the annual meeting of the Association shall nominate a member of the General Council for such state according to the present custom. Vacancies in the General Council, occurring between the annual meetings of the Association, may be filled by the Executive Committee without formal convention of the committee.

2. Amend that part of Article IV of the Constitution, providing for a Vice-president from each state and four other members to constitute a Local Council for such state (*see* second paragraph on page 4 of pamphlet copy of Constitution and By-laws), to read as follows:

A Vice-President for each state and four other members from such state, to be annually elected during the month of May by the members resident of such state, shall constitute a Local Council for such state. The time and manner of such elections shall be as provided in By-law XIII. The Vice-President shall be ex-officio chairman thereof. The Vice-President shall report to the Committee on Memorials the deaths of members from his state. Vacancies in the Vice-Presidency or in the Local Council for any state shall be filled by the remaining members of the Local Council for that state. The Vice-President shall promptly certify to the Secretary of the Association the names of persons chosen to fill vacancies.

3. Amend the By-laws of the Association, by adding thereto Section XIII, as follows:

Section XIII. (a) The balloting prescribed in the Constitution for the nomination of a member of the General Council from each state shall be conducted by the respective Vice-Presidents of the respective states. It shall be taken in each state during the month of May of each year. On the written request of five resident members, filed with the Vice-President not later than the 10th of May of each year, the Vice-President shall place on the ballot prepared by him, under appropriate heading, the name or names of members proposed for member of the General Council for such state, and not later than the 20th day of May of each year shall mail to all resident members therein a ballot upon which the members shall indicate their choice and promptly return the same to the Vice-President. The member receiving the highest number of votes shall be certified by the Vice-President to the Secretary of the Association before June 15, and his name shall be published in the next issue of the Journal. He shall be the nominee for member of the General Council from such state and shall be presented by the Secretary for election at the next annual meeting.

(b) The balloting prescribed in the Constitution for the election of a Vice-President and four other members of the Local Council for each state shall be conducted by the Vice-Presidents of the respective states. It shall be taken at the time and in the manner prescribed for the nomination of members of the General Council, and one form of ballot shall be used both for purposes of nominating a member of the General Council and of electing a Vice-President and four other members of the Local Council. The person receiving the highest number of votes for Vice-President and those receiving the highest number of votes for members of the Local Council shall be such officers. The Vice-President conducting the election shall certify the results to the Secretary of the Association, who shall publish the names of the persons so elected in the next issue of the Journal. Upon a failure of the resident members of a state to elect a Vice-President or a member or members of the Local Council, the members from such state attending the annual meeting of the Association shall make such elections.

(c) The actual expenses of conducting the elections provided for in this by-law shall be paid by the Treasurer of the Association upon account certified by the Vice-Presidents of the respective states.

THE LANGUAGE OF THE LAW

Defects in the Written Style of Lawyers, Some Illustrations, the Reasons Therefor, and Certain Suggestions as to Improvement.

By URBAN A. LAVERY

Chief Legislative Draftsman, Illinois Constitutional Convention, 1920-21.

I.

WHEN Shakespeare made Hamlet say to the grave-digger:

> Why may not this be the skull of a lawyer?
> Where now be his quiddities, his quillets,
> His cases, his tenures, and his tricks?

he was paying the profession a real compliment; and a compliment none the less because it was intended as a slur. A quiddity is defined by Webster as a "trifling nicety," and the word quillet is another form of "quibble." Both words seem to have been in fairly common use three hundred years ago and Shakespeare used them to express the sharpness of the lawyer and his facility in the use of words even in that day and time. For the ability of the lawyer to confuse others by the use of words has long been the subject of proverbs. The reasons for this distinction—or if you prefer, for this reproach—are not hard to find; they lie in the lawyer's training and in the work he is called upon to do. And yet, no matter what else may be said of him, the lawyer, in his field—even as the physician and the priest in theirs—remains the last resource of other men and women. When the wisdom of common men fails them and disaster is at hand, when the layman's brain is overworked till his mental fuse burns out, when the motor car of "Business" blows out its tires and piles up in the ditches of insolvency, when the human derelict is finally tossed upon the rocks by the stormy seas of life, then the lawyer is sent for and his "quiddities" and his "quillets" are more than welcome; then the myriad complexities of human frailty, and the baffling chicanery of men, test out all "his cases, his tenures, and his tricks."

And yet it is not the purpose of this paper to praise the linguistic nimbleness of the lawyer, but rather to consider some of his defects. It is to ask: Why is it that the lawyer, who thinks and speaks the King's English better than his fellows, falls below them when he writes it? Why does the lawyer seem to lose his mastery of words when he puts his pen, instead of his tongue, to the task of expressing them in statutes, in judicial opinions or in legal documents? For it is an ancient charge that the lawyer, as compared to other writers, is prolix and muddy in his literary style and is unduly given to the over use of words.

But discussing such a subject is no easy task. For teaching others the art of writing—and especially is it true of writing laws—has ever been recognized as a difficult and dreary job; difficult and dreary alike for both teacher and scholar. Moreover, he who undertakes the task is likely to be marked down as an Egoist for his pains; he runs the risk of being called a pedantic preacher. Especially does he run this risk in this day and time, when the world is full of preachers and nobody stops to listen; when everybody gives his neighbor advice on every topic under the sun and nobody pays the slightest heed. Just as a current example one might mention the fact that almost more books have been written about the war than there were soldiers who fought in it; while the River of Ink about the Treaty and the League of Nations flows on and on even though all those who were the real actors in the great drama have silently gone back to work.

There is another point about our task which must be kept in mind; it must be carried out with a nice delicacy and a subtle sense for the Egotism of others. For it is quite true, as the grammarian Goold Brown has said:

> It is even impertinent to tell a man of any respectability that the study of his native language is of great importance and interest; if he does not from the most obvious considerations feel it to be so, the suggestion will be less likely to convince him than to give offense.[1]

Nevertheless, this most laborious and exhaustive of all students of English grammar proceeds in more than a thousand pages of fine octavo print to tell his fellow men how important the study of their native English really is. Indeed, in spite of the difficulty and delicacy of the task a great many others have done the same thing, for the list of books on the Art of Writing is endless. There are books on writing poetry, there are books on writing prose, there are books on writing scientific English, on writing business English, on writing orations, on writing plays,—on writing every kind of English except (so far as I know) on writing legal English. Everybody seems to have assumed that all lawyers write good English, even though everybody knows pretty well that they do not. One of the purposes of this paper is to call attention to the lack of such a book rather than to supply it. And if in discussing the subject, this paper too should seem to preach, it is done with fear and trembling; for although words are to be loved when they are well used, yet even more does the active man love deeds best.

And so without further explanation or introduction let us come to grips with our subject.

William Caxton was not only our first English printer, but he was also an observant and careful writer and one of the first English authors to be interested in keeping pure the style of his mother tongue. In the year 1490 he published a translation of the Aeneid from the French and in the preface to his book he refers to the literary style of some of the writers of his time, and says:

> . . . For in these days any man that is in any reputation in this country will utter his communication and matters in such manner and terms that few men shall understand them; and some honest and great clerks have been with me and desired me to write the most curious terms that I could find. And thus, between plain, rude and curious, I stand abashed.[2]

These words were written before the discovery of America, and yet the reader will notice how clear the meaning is and how entirely the words are

1. Grammar of English Grammars, 10th Ed., 1831, p. 94.
2. Quoted in "Words and Their Uses," by Richard Grant White, p. 17.

written in the English of today. For the purpose of getting a good sample of the legal English of that time I turned to the Acts of Parliament, passed during the seventh year of the reign of Henry VII, which was also the year 1490, and there I hit upon an Act to provide for "The penalty of a captain or soldier retained to serve the King in his intended wars, not doing their duties." The purpose of the Act as thus stated is clear and concise; but the statute goes on:

> For as much as it is notoriously known that the King, to his great costs and charges, hath sent his ambassadors to Charles his adversary of France, to have had convenient peace with him, and to have his right without effusion of Christian blood, which was refused; wherefore the King, by the grace of God in whose hands and disposition resteth all victory, hath determined himself to pass over the sea into his realm of France, and to reduce possession thereof by the said grace to him, and to his heirs, Kings of England, according to his rightful title . . .[3]

This quotation gives less than a third of the first sentence of the statute. The sentence goes on and on in terms and phrases strangely like those of modern legislators, until we come finally to the real business intended, where it is said:

> BE IT THEREFORE ORDAINED by the authority of this present Parliament, THAT any captain . . . etc.

One can hardly help wondering if the "great clerks" of whom Caxton speaks were not the lawyers of his time; and if that author—in referring to the men who "uttered their communication and matters in such manner and terms that few men shall understand them"—did not have in mind the gentlemen who sat in Parliament.

A hundred years after Caxton we find Shakespeare speaking of the lawyer in the manner shown by the quotation already given, and we realize what was thought about the literary style of the lawyers in the Golden Age of Elizabeth. Two hundred years more pass, and we come upon the name of Blackstone—a very great lawyer, but a lawyer who was an exception to the rule, for he wrote in a clear and fascinating style, so much so that laymen have read him with unceasing interest for over a century and a half. Blackstone himself often criticized the language of lawyers. Speaking of the lawyers who wrote the Acts of Parliament he said:

> To say the truth, almost all the perplexed questions, almost all the niceties, intricacies and delays (which have sometimes disgraced the English as well as other courts of justice), owe their origin not to the common law itself, but to innovations that have been made in it by Acts of Parliament, "overladen," as Sir Edward Coke expresses it, "with provisos and additions and many times of a sudden penned or corrected by men of none or very little judgment in the law."

This indictment is pretty severe; though lawyers no doubt will find their alibis. It is easy to think some up; and yet they are not wholly good—for the lawyers *are* responsible for the wording of the written law.

In my work for the Illinois Constitutional Convention I have read and used many books on the subject of drafting laws; but one book, though it is hardly more than a pamphlet, stands alone (in some respects) for its philosophic treatment of the subject. It is called "Legislative Expression,"[4] and was written by George Coode, a member of the Inner Temple, and submitted in 1843 as a part of a report presented to Parliament. The words of Coode are so pat for the subject now in hand, they can hardly be omitted, for he says:

> There is apparently a notion among amateurs that legislative language must be intricate and barbarous. Certain antick phrases are apparently thought by them to be essential to law writing. A readiness in the use of "nevertheless," "provided also," "it shall and may be lawful," "is hereby authorized, empowered and required," "nothing in any act or acts to the contrary notwithstanding," etc., etc., seem to constitute the qualifications for drawing Acts of Parliament.

The author here lays his finger on a defect which somehow always persists. It appeared in the old statute of Henry VII, and it may be observed in this year of grace at Washington, at Springfield, or wherever the work of our modern legislators is considered. And yet, as this critic truly says:

> It is, however, a clear mistake to think that this absurd style, prevalent as it is, and much as we sacrifice to adhere to it, has the sanction of written authority . . . It is to be observed that after all nothing more is required than that instead of an extended and incongruous style, the common, popular structure of plain English should be adhered to.

These criticisms of Blackstone and Coode seem fair enough, and the lesson to be learned is obvious. Yet the form and style and wording of our statutes have been changed but little—to say nothing of being improved—in five hundred years.

This matter of drafting laws is really a large part of our subject and it may well concern our thoughts. Indeed, it may be truly said that the form and style of our written laws make up a chief cause for complaint against the language of the lawyer. For laws, like the poor, are not only always with us, they are above us and around us and almost reach within us. They must be read and obeyed—and therefore understood—by laymen as well as lawyers; since ignorance of the law excuses no man. For obvious reasons therefore, laws should be as clear and simple as possible. Yet, strangely enough, it is in this matter of writing laws that the lawyer often reaches and surpasses the limits of human capacity. If you take up the present Constitution of the State of New York you may read a single sentence from Article 8, Section 10, beginning:

> All certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes," etc.

which covers a full page of print. The sentence is far too long to quote, for it contains 462 words without a single break; it is more than five times as long as the entire Ten Commandments, which have altogether 91 words.

Modern law books are full of examples of a like kind, for indeed our constitutions and statutes seem to vie with each other in a race to be long-winded and complex. Two further examples will suffice. The first is from Section 34 of Article 4 of the Constitution of Illinois. Here is to be found a single sentence containing 494 words. Yet the sentence is concerned with a complex and difficult subject matter which would be hard to understand if stated in the simplest terms. This sentence would occupy more than one-third of a column of an average newspaper, and consequently it defies being understood even when read over and over again. The Constitution of Oklahoma has many illustrations of this character; it is full of sentences con-

3. Statutes at Large (Cambridge, 1768), Volume 4, p. 51.

4. Printed in "Law Library," Vol. 29; also found in Brightly's Purdon's Digest, 1873 (Pa.).

taining from one hundred to four hundred words. What might be considered as the prize in this regard is found in Article 1, Section 7, of that Constitution, where a "proviso" clause to another sentence contains 237 words. Let the lawyers who read this indictment turn to these examples and answer if they can what is meant by the language used. Certainly no layman—absolutely not one—could ever be guilty of writing in such a style, no matter how difficult the subject or how involved the idea to be expressed. One must admit that this is strong criticism, but it certainly seems justified; because whatever else such examples may be called, they are not written in the English language.

It is not only in writing laws that the style of lawyers has been criticized, but in writing everything else. In order to prove the point let us take up at random two well known modern law books. In Branson's Illinois Forms, at Page 1109, there appears a lease for a dwelling house for a term of years, a form which is recommended for general use. One does not criticize its use; it is far too old and too much crystallized in the body of our law. But certainly the language there used proves the fairness of the criticism here made. One paragraph of the lease begins:

> Provided always that these presents are upon this condition, that if the said rent shall be in arrears . . .

What more do these words mean than if the paragraph began—"If the said rent shall be in arrears?" There seems no difference in meaning or legal effect; except that one form says in 18 words what the other says in 8. In a book written nearly one hundred years ago—and yet a book of the greatest help to the legislative draftsman in his special work—there is found the following quotation:

> From the manner in which lawyers usually multiply terms in order to express their facts *precisely*, it would seem that, with them, precision consists rather in the use of *many* words rather than a *few*. But the ordinary style of legal instruments no popular writer can imitate without becoming ridiculous.[5]

Certainly the language of this critic seems entirely fair if applied to the lease in question.

The other modern book referred to is Foster's "Federal Practice" (Fifth Edition), which will be recognized as a widely used and popular law book. In it there is given a set of forms for pleadings, and on page 2640 there appears a form for a Bill of Foreclosure of a Railway Mortgage. The third paragraph of this bill contains a single sentence which covers more than a half page of fine print; the sentence by actual count has 352 words. It has fifteen or sixteen main verbs and more than a score of modifying phrases and clauses. The fourth paragraph of the bill consists of a single sentence, which again is very long, for it contains 261 words. Both of these examples (to repeat) are taken from modern law books; and yet it is quite true, as Goold Brown has stated, that no layman could imitate this style "without becoming ridiculous."

Of course, it may be said that counting words in sentences is a poor way to prove our case; and yet this matter of sentence length seems to be the "maxima culpa" of the lawyer. On this point a recognized and authoritative modern text-book says:

> The sentence is the basic unit of expression. We cannot so much as resolve to telephone a customer without forecasting it to ourselves in some sentence form . . . Sentence length in business messages demands consideration in order that the best results may be secured. As a general rule, sentences should be short, because short sentences are more quickly and easily understood than long sentences. A sentence containing not more than fifteen words is called a short sentence.[6]

If *fifteen* words is a short sentence, what then is to be said of the sentence of 494 words in the Illinois Constitution, or the sentence of 352 words in the Bill to Foreclose a Railway Mortgage?

In concluding the first part of this paper let us call—as an expert witness on the literary style of lawyers—an authority whose opinion carries weight. More than thirty years ago the late Barrett Wendell wrote his famous treatise on "English Composition." It has been called an "epoch-making book" and is a work that practical lawyers (as well as other men who write) may study with constant interest and profit. He refers at considerable length to the habit of judges of using interminable sentences in their written opinions. He speaks also of the prolixity of the style of the average lawyer and criticises the "appalling" manner in which legal English is so often written. He says:

> At one time it was my fortune to read a good deal of law; even after I had learned what the technical terms meant, I found the greatest trouble in understanding the books . . . Not long ago a friend sent me a sentence from a respectable legal periodical. He described it as a beautiful expression of legal English, and here it is:

At the risk of being tiresome I am giving the sentence in full, because I believe Wendell is entirely fair in his implication that the quotation is a good example of modern "legal English."

> "The comparatively recent introduction of sleeping cars upon the great highways of travel, as a means of public conveyance, while it marks a new era in the history of common carriers of passengers, and signalizes the advancement of the age in the attainment of the luxuries of refinement and wealth, yet on account of the unique and peculiar features of the system as it exists, both with reference to the railroads that employ them, and to the traveling public that enjoy their superior comforts and facilities, there have arisen interesting questions of law, touching the responsibility of such companies, for the loss or theft of the goods, luggage, and valuables of passengers, upon which there exists, among the bench and bar, an undesirable, and, it would seem, needless amount of uncertainty, not to say, diversity of legal sentiment." (p. 225)

Wendell makes the same criticism of the opinions often written by judges and quotes a very long sentence from an English opinion written in 1842, and says, by way of conclusion:

> If the learned judge who laid down the law about pleas of set-off had given a little attention to the principle of unity he would have bettered his opinion without hurting his law; at all events, he would have said exactly what he did say, but in such a manner that an ordinary human being could understand that he was uttering something other than a string of technical words. If the gentleman who wrote about sleeping cars had given the principles of composition a tenth part of the consideration he gave the legal questions in hand, he might, by the simple exercise of good sense, have produced an essay that an ordinary human being could read.

You will read in that book of Goold Brown's to which reference has been made so many times, that Henry VIII, who seems never to have done things by halves, caused a law to be passed by Parliament commanding the English Grammar written by one William Lily to be everywhere adopted and taught. Indeed, the King went further, for he became in name at least one of the editors of the book which was called "King Henry's Grammar." The privi-

5. Goold Brown's "Grammar of English Grammars," p. 1064.

6. "Hand Book of Business English," Hotchkiss and Kilduff, p. 58.

lege of publishing (and no doubt the profits too) was patented by the Crown. Goold Brown states that so far as he was able to learn when he wrote his book in 1832, the old act was still in force in England—at least it had never been repealed. It is not so easy in these days to do such things; nevertheless, we, as lawyers, still have a practical interest in striving for correctness in such matters.

II.

The first part of this paper concerns itself chiefly with some illustrations of the defects in the written style of lawyers. We come now to considering the why and the wherefore of these defects and—with grave modesty—to offering some suggestions as to their cure. It has been said that our subject has been called dreary, and yet it need not be dreary if it is properly presented. As a proof of this there may be cited an admirable modern book on rhetoric and style recently published by the Oxford University Press and written by two men who have largely helped to compile the great Oxford Dictionary. The book is called "The King's English," and in the preface you will find both the reasons for this dreariness and the ways to avoid it clearly pointed out, for it is there said:

> It is notorious that English writers seldom look into a grammar or composition book; reading of grammars is repellent, because, being bound to be exhaustive on a greater or less scale, they must give much space to the obvious and unnecessary; and composition books are often useless because they enforce their warnings only by fabricated blunders against which every tiro feels himself quite safe.

It is "notorious," say these authors, that English writers seldom consult a book on grammar or composition. Is this not even more true of lawyers? How many lawyers who write briefs or other documents requiring unusually careful statement ever consult such a book once to the hundred times they consult their law books? How many lawyers, for example, know and apply in their writing the proper uses for those fundamentally different methods of expression—the loose and the periodic sentence? How often do they stop to consider questions of syntax, which is defined as "the construction of sentences;" or to consider the laws of good use which apply to adverbs, prepositions, to conjunctions, to participles and infinitives, to relative pronouns and to all the other parts of speech? These things, no doubt, *sound* academic and dreary; and yet when convincing argument is to the fore, or clearness of expression is desired, they are often more important than piled up citations of cases. In this book which has just been mentioned you will find proof that these things are not so dreary or so remote or so impracticable as they sound. The book is made up on an excellent scheme, for it consists almost entirely of what the authors call "Blunders that observation shows to be common." Accordingly, you will find in this book most of the great names of the last century—Emerson, Lowell, Thackeray, Balfour, Meredith—all quoted to show how bad English and bad grammar will sometimes be found in good company.

But our special concern here is with the characteristic faults of the literary style of lawyers, and some of these faults will now be considered in some detail. The chief fault of lawyers is certainly that of prolixity. Webster defines "prolix" as "extending to great length," and then in a note he says: "Prolixity is one of the worst qualities of style." There are, of course, deep and subtle reasons for the prolixity of what lawyers write—reasons which lawyers do not generally realize or understand. They lie chiefly in two ever present factors; a constant and inherent complexity of subject matter, and an impelling urge toward guarded and cautious language. It may be from experience, it may be from instinct—but the lawyer uses his pen as if it were an old-fashioned breech-loading musket; he is always afraid of the "kick" when the thing goes off. Lawyers who are intellectually honest will recognize this tendency toward prolixity in their own experience, and will constantly be on their guard against it.

A clear example of what is here meant is found in the life of Jeremy Bentham, a lawyer who is almost as famous in English law as Blackstone himself. Bentham has been called the greatest law reformer who ever lived in any country, and it is generally conceded that the form and style of the modern Acts of Parliament are largely due to his writing and his influence. He became famous by publishing in 1776 his celebrated "Fragment on Government," and he continued to write voluminously for nearly sixty years until his death in 1832. He was constantly thundering against the prolixity of statute law. During his earlier years he wrote clearly and well, but as the years went by and he grew older, he gradually lost his sense of style, until his later works became most difficult to read. Ilbert, one of the leading modern writers on legislative drafting, who for many years has acted as parliamentary counsel to the British Treasury, in discussing Bentham's influence on legislative drafting, says:

> Bentham in his early years wrote admirable English, terse, lucid, vigorous, racy, pungent . . . but in his later years his eccentricities grew upon him until he became almost unreadable, except as interpreted and translated by such favorable disciples as Dumont.[1]

It was, no doubt, to take a fling at lawyers in general, rather than at one of the greatest of them, that made Fitzgerald exclaim:

> What would have become of Christianity if Bentham had had the writing of the Parables?

Bentham's case was exaggerated, but his faults in a less degree became the faults of many lawyers and judges. Their style becomes crabbed because they are excessively cautious, because they move so slowly as to make their readers tired, and because they insist upon explaining what needs no explanation.

What I am trying to convey here has been well expressed by John Stuart Mill, who was a great authority on rhetoric and the art of writing, as well as a famous critic of government and laws. He was also speaking of Bentham when he said:

> He could not bear, for the sake of clearness, and the reader's ease, to say as ordinary men are content to do, a little more than the truth in one sentence and correct it in the next. The whole of the qualifying remarks which he intended to make he insisted upon imbedding as parentheses in the very middle of the sentence itself. And thus the sense being so long delayed, and attention being required to the accessory ideas before the principal idea had been properly seized, it became difficult without some practice to make out the train of thought.[2]

Mill was a philosopher as well as a very learned critic and there is a wealth of meaning for lawyers in his words. Does he not here express a cogent criticism of most lawyers' writing? Do *they* not also insist on "imbedding" their qualifying remarks

1. Mechanics of Law Making, p. 96.
2. Dissertations and Discussions—Bentham. J. S. Mill.

in the middle of the sentence, before the main idea has been "properly seized?"

Professor Hill of Harvard, perhaps the greatest American rhetorician, discusses this subject of prolixity in a way to show its importance in writing. He speaks of lawyers and gives a famous quotation which seems still good advice for them, although more than 100 years have passed since it was spoken:

> "Mr. Jones," said Chief Justice Marshall on one occasion, to an attorney who was rehearsing to the Court some elementary principle from Blackstone's Commentaries, "there are some things which the Supreme Court of the United States may be presumed to know."

This quotation is taken by Hill from a text-book on "The Theory of Preaching," and some of the advice of this book may well be taken to heart by lawyers as well as preachers. The quotation goes on:

> Be generous, therefore, to the intelligence of your hearers. Assume sometimes that they know the Lord's Prayer. Do not quote the Ten Commandments as if they had been revealed to you instead of to Moses. The Sermon on the Mount is a very ancient specimen of moral philosophy; do not cite it as if it were an enactment of the last Congress. The Parables are older than the "Meditations" of Aurelius Antonius; why then rehearse them as if from the proof-sheets of the first edition? In a word, why suffer the minds of your audience to be more nimble than your own, and to outrun you?[2]

It is easy enough to be critical, but have we not all heard sermons—and read lawyers' briefs—which reminded us of the well known quotation:

> You say an indisputed thing in such a solemn way!

Another chief defect in the writing of lawyers is the fact that they use circumlocution rather than straight, blunt speech. They prefer to go round a subject with their words rather than straight to it. In their use of language they prefer a steam shovel rather than a spade—and then they neglect to cast away the rubbish. Here again we can cite with profit an eminent modern authority, Sir Arthur Quiller-Couch, the famous professor of English literature at Cambridge University. He has written much—novels, poetry and essays—but nothing better than his treatise on the "Art of Writing." In that book he devotes a chapter—and any lawyer who has not read it is the poorer—to what he calls "Interlude: On Jargon."

I will not ask pardon for making extended quotations from this book because to do so will carry us on our way. The author seems particularly to have in mind the lawyer and the draftsman of legal English when he says, concerning Jargon:

> Caution is its father, the instinct to save everything and especially trouble; its mother, Indolence. It looks precise, but is not. It is in these times safe; a thousand men have said it before and not one to your knowledge has been prosecuted for it. . . It is becoming the language of Parliament; it has become the medium thru which boards of Government, County Councils, Syndicates, Committees, Commercial Firms, express the processes as well as the conclusions of their thought.

And he illustrates his meaning by an example which is certainly a common one:

> Has a Minister to say "No" in the House of Commons? Some men are constitutionally incapable of saying no; but the Minister conveys it thus: "The answer to the question is in the negative." That means "no." Can you discover it to mean anything less, or anything more except that the speaker is a pompous person?

It is in what Quiller-Couch calls "Jargon" that lawyers most offend. They have a cautious dragnet method about their work, and they carry the same method into their writing. To quote this author further:

> As a rule Jargon is by no means accurate, its method being to walk circumspectly around its target and its faith, that having done so it has either hit the bull's eye or at least achieved something equivalent and safer.
>
> Have you begun to detect the two main vices of Jargon? The first is that it uses circumlocution rather than short straight speech. . . . The second vice is that it habitually uses vague, woolly, abstract nouns rather than concrete ones.

By way of conclusion Quiller-Couch gives what he calls "two extremely rough rules to avoid Jargon:"

> The first is: Whenever in your reading you come across one of these words—*case, instance, character, nature, condition, pursuant, degree*—whenever in writing your pen betrays you to one or another of them, pull yourself up and take thought . . .
>
> For another rule just as rough and ready but just as useful: Train your suspicions to bristle up whenever you come upon *"as regards," "with regard to," "in respect of," "in connection with," "according as to whether,"*—and the like. They are all dodges of Jargon, circumlocutions for evading this or that simple statement; and I say that it is not enough to avoid them nine times out of ten or ninety-nine times out of a hundred. You should never use them.

Under the first rule the author has in mind the "vague, woolly, abstract nouns rather than concrete ones," concerning which he has already spoken. A little thought will indicate how often such words are used by lawyers, and yet a little care will usually prove how these words may be avoided and the writing improved; for such words are mostly used because they are handy dodges of a tongue or pen, whose thought is itself not sharp and clear. Take the words "case," "instance," or "character"; they are all (usually) grab-bags into which we stuff rag ends of ideas whenever we do not care to be accurate and specific. Like Charity, they cover a multitude of sins; and hence they find frequent use. The phrases quoted by the author under the second rule are even less to be excused. It is seldom that such phrases as "in respect of," or "as regards" really help the meaning of what is written; they are usually a sort of spring-board, used for jumping from one idea to another. No doubt it will sometimes be necessary to use such words or phrases; but let the writer be frank with himself and recognize he is being vague rather than clear, that he is being abstract rather than concrete, that he is dealing with the general rather than the specific; or that he is using one or more of the phrases which Quiller-Couch condemns, as a sort of coupling-pin for his thoughts.

It will, of course, be obvious that the lawyer cannot always accept these suggestions. But where is the lawyer who can stand up boldly and plead "not guilty" to an indictment for using "Jargon" as it is pointed out in these quotations? Where is the literary lawyer who will not improve his style if he keeps such things in mind?

It may be admitted—indeed it must not only be admitted but asserted—that the lawyer's problem in writing is a difficult one. Whether he has to write a statute, a deed, a will, or what not, the lawyer must do more than the average writer; he must make what he writes (as I have heard it put) "fool-proof." Indeed, not only "fool-proof" but "knave-proof." A lawyer must so word his docu-

2. Hill, Principles of Rhetoric, p. 333.

ment that it will be impossible to misconstrue it. The average writer does not have this problem; he need only write for the average reader. In other words, he so writes that his words *ought not* to be misconstrued; but the lawyer must so write that his words *cannot* be misconstrued. To put the matter another way, the average writer may expect and demand good faith—that is, an honest intention to get at the meaning of what is written—from his reader. The lawyer, on the other hand, must anticipate bad faith on the part of many of his readers and must guard against it; he must so write that the reader who is seeking some other meaning than the natural meaning of the words used, will be foiled in his purpose. Especially must the lawyer constantly anticipate the astute attack of other lawyers in an effort to destroy or muddle up the meaning of his words.

But conceding this, it is the major thesis of this paper—as will be inferred from what has gone before—that lawyers do not give due attention to the detailed business of what Quiller-Couch calls "Art of Writing." Every lawyer thinks that he can write good English, forsooth because he is clever with his tongue; but nimbleness with oral words is not enough. Roget, the famous author of the "Thesaurus of English Words," called attention to this fact in the admirable introduction which he wrote to his book nearly three quarters of a century ago. There is no doubt that Roget had in mind writing as distinguished from speaking, when he said:

> However distinct may be our views, however vivid our conceptions, or however fervent our emotions, we cannot but be often conscious that the phraseology we have at our command is inadequate to do them justice. We seek in vain the words we need and strive ineffectually to devise forms of expression which shall faithfully portray our thoughts and sentiments. The appropriate terms, notwithstanding our utmost efforts, cannot be conjured up at will. Like the spirits from the vasty deep they come not when we call.

It has already been said that lawyers use written words and sentences as if they were to be spoken orally; that is their chief mistake. Conversation is at its best when it is a hit and miss affair—often conveyed by a glance, a gesture, a tone, or even a pause. It is a truism to say that what is well spoken may have an abominable style if written. It is easy to apply a simple test; let anyone listen to the debates of a political assembly or a convention, and then let him read a stenographic report of the same speeches. What was clear and forceful when spoken will often appear disconnected, redundant and even ungrammatical when printed.

We must never forget the magic of the spoken word. It is as different from the written word as a man is from his photograph; indeed, the writing is after all but a picture for a word. The ancient Greeks, who were, and still remain, the great masters of the literary world, knew the deep difference between speech and writing. With them these two arts of oratory and rhetoric were carried to the highest point reached by man; and yet with them the two arts were always separate and distinct. Indeed this must be so. The spoken word is a living, breathing thing which fights for its life in the hurly-burly, and give-and-take, of talk. It is the natural, instinctive means of expression of the human being, compared to which the written word is highly artificial. In talk two or more personalities are always contending. On the other hand, writing is always what lawyers call an "ex parte proceeding"—there is only one side represented. There is no opportunity in writing, as in talk, for instantaneous question and reply. Moreover, the spoken word cannot easily be smothered out, or if it is, it bobs up again in a moment, to be repeated and repeated until its point is made.

If one listens to a heated argument—as an outsider—between even common men, what impression does one get? Particular words are stressed and repeated and repeated again, until all doubts of the speaker's meaning have been cleared up. The person spoken to can no more avoid the meaning intended than he could avoid getting wet if he stood out in the rain—he is drenched in a shower of words. But written words cannot be used so lavishly; one by one they must pass before the reader's eye and each must make its point or fail, for there is no bringing up of reserves, as in a battle. Perhaps this point can be made clear by illustration. If an address is spoken, instead of written, the speaker—if he is experienced—will see from the faces of his audience the points they do not readily understand and will go back and cover the ground again. If a paper is read by the author to an audience, he can by emphasis and stress and voice control go part way in this direction. Finally, if the audience should read the same matter in type, they would probably be less impressed—certainly they would not get the same meaning or impression as if either of the other two methods were employed. Taken in the order of their effectiveness therefore, there are three grades in expression; first, the oral address; second, if the author reads what he has written; and third, if the reader does all the work and must interpret for himself.

It is just this difference between oral and written words which makes the dictated brief such an atrocity. That document is a mongrel which has speech for its father and writing for its mother; and it exhibits all the vices and none of the virtues of its parents. Such a document shows an utter failure to realize the technique which lies in the art of writing, for there is a technique in writing English, and especially in writing legal English, as this paper has tried to show. It is a technique which can only be acquired by persistence and effort and laborious attention to details; it does not come with the profession, as many lawyers think.

This paper is already over-long, but we are coming to the end. Its purpose was to show that lawyers in their writing overlook—as beneath notice—what have been called the "subtle and inconsiderable elements of style." I know what some of the lawyers who read this will be saying in their hearts; that it is all very pretty, but is academic and has very little to do with the everyday business of the lawyer. If this paper has not already made clear that these things of which we have been speaking are really of the greatest importance, it cannot do so by further argument.

One further opinion on the point will be given from a book written nearly two thousand years ago. The words are quoted from Quintillian, the greatest of Latin rhetoricians, he whom the Romans called

"the supreme controller of the restless youth." He said:

> Wherefore they are little to be respected who represent this art as mean and barren; in which, unless you faithfully lay the foundation for the future orator, whatever superstructure you raise will tumble into ruins. It is an art necessary to the young, pleasant to the old, the sweet companion of the retired and one which in reference to every kind of study has in itself more of utility than of show. Let no one therefore despise as inconsiderable the elements of grammar.

Is not this statement as true now as it was in the days when Cicero was the leading lawyer of Rome, as well as the best grammarian of his time? And yet how many lawyers ever concern themselves with these "little things?" How many lawyers ever stop to parse a sentence? To repeat a question that has been asked before: How many lawyers ever consult once a book on grammar or on good use of English, where they consult a lawbook a hundred times? A short examination of what many lawyers write will answer these questions without further search. It must be admitted that the lawyer too often is a careless writer; and he, before all men, might write well if he but strove to do it. But he does not strive; he "dangles" his participles, he "splits" his infinitives, he scatters his auxiliary verbs, he leaves his relative pronouns and adjectives to die of starvation far removed from their antecedents; his various parts of speech are often not on speaking terms with their best friends. And when it comes to making sentences, he piles phrase upon phrase and clause on clause ("imbeds" them, as Mill has called it) until what he produces is as uninviting and as hard to penetrate as those rows upon rows of barbed wire, tangled deep with weeds, which used to stand before the outposts of Verdun. As a result, when he gets through a paragraph of a Bill of Equity, or a section of a statute, he is, as Wendell has pointed out, "far beyond where any human being retains the slightest idea of what all this means."

REVIEW OF RECENT SUPREME COURT DECISIONS

Exemption of Insurance Money from Debts—Unlawful Search and Seizure—Federal Control of Navigable Waters—Oklahoma and Texas Boundary Case—Safety Appliance Act and Proximate Cause—Indiana Workman's Compensation Act Sustained.

By Edgar Bronson Tolman

Constitutional Law.—Impairment of Contract—Exemption of Insurance Money from Debts.

Bank of Minden v. Clement, Admx., Adv. Op. p. 473.

An act of Louisiana passed in 1914 undertook to exempt from debts of the assured the avails of insurance upon his life when payable to his estate. Prior to the passage of this act defendant's intestate took out two policies on his life with loss payable to his executors, etc., and his administratrix collected the stipulated sums. The banks sought to subject the insurance to their claims, maintaining that the act if construed and applied so as to exempt such funds would impair the obligations of their contracts. The Supreme Court of Louisiana sustained the statute and the case was reviewed on writ of error to that court. The opinion was delivered by Mr. Justice McReynolds who cited the following from the opinion of Chief Justice Marshall in Sturges v. Crowninshield (4 Wheat. 197):

> What is the obligation of a contract, and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. . . . Any law which releases a part of this obligation must, in the literal sense of the word, impair it. . . . But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation.

In conformity with the principles thus laid down by Chief Justice Marshall and those by Mr. Justice Woodbury in Planters' Bank v. Sharp, 6 How. 327, Mr. Justice McReynolds declared that:

> So far as the Statute of 1914 undertook to exempt the policies and their proceeds from antecedent debts, it came into conflict with the Federal Constitution.

Mr. Justice Clarke dissented but did not state the grounds of his dissent.

The case was argued by Mr. Hampden Story for the Bank and Mr. J. D. Wilkinson for the Administratrix.

Criminal Law.—Evidence, Returns.

Amos v. *United States*, Adv. Ops. p. 316.

Defendant was indicted for the removal and sale of whiskey without the payment of the tax required by law. Before any evidence was offered the defendant presented a petition for the return of certain property which the District Attorney intended to use in evidence at the trial and which had been seized by the government officers in a search of defendant's house and store made unlawfully and in violation of his rights under the Fourth and Fifth Amendments to the Constitution.

The application was denied. On the trial of the case two deputy collectors of internal revenue testified for the Government that they went to the defendant's home and, not finding him there but finding his wife, told her that they were revenue officers and had come to search the premises for violations of the revenue law; that thereupon the wife opened the store and the witnesses found secreted bottles of "blockade whiskey," and that going into his home they found secreted other bottles of illicitly distilled whiskey. They admitted on cross examination that they did not have any warrant for the arrest of the defendant nor any search warrant to search his house and that the search was made during the daytime in the absence of the defendant, who did not appear until after the

search had been made. A motion was made to strike out this testimony which was denied.

The opinion was delivered by Mr. Justice Clarke, who held that the search of the defendant's home by government agents without warrant of any kind was in plain violation of the Fourth and Fifth Amendments to the Constitution and that the denial of the petition and of the motion to exclude the property and the testimony relating thereto was prejudicial error. To the claim of the government that the motions came too late because the jury had been impaneled, and the trial to that extent commenced, the court held that in view of the fact that the sworn petition of the defendant was not in any respect questioned or denied, the petition was not too late and that the motion was timely.

Mr. H. H. Obear argued the case for the defendant and Mr. W. C. Herron for the Government.

Navigable Waters—Control of.

Economy Light & Power Co. v. *United States,* Adv. Ops. p. 487.

The United States brought suit against the Power Company for an injunction to restrain it from constructing a dam in the Desplaines River just above the point where the Desplaines joins the Kankakee to form the Illinois River, without the approval of the location and plans by the Chief of Engineers and Secretary of War of the United States on the ground, first, that the river bed where the dam was being constructed was the property of the United States, and, second, that the Desplaines River was a navigable waterway of the United States and the proposed construction of a dam therein was in violation of the Act of Congress declaring it unlawful to build any dam or other structure in any navigable waterway without the approval of the Secretary of War.

The substantial defense was that the Desplaines River at the site of the proposed dam was not navigable in fact and not within the description "navigable river or other navigable water of the United States" as employed in the act referred to.

The Circuit Court of Appeals, Seventh Circuit, affirmed a decree of the District Court, N. Dist. Ill., finding that the Desplaines was a navigable waterway of the United States and enjoining the construction of the dam. Both courts found that in its natural state the river was navigable in fact and that it was actually used for the purposes of navigation and trading in the customary way and with the kinds of craft ordinarily in use for that purpose on rivers of the United States, from early fur trading days (about 1675) down to the end of the first quarter of the nineteenth century. It was part of a well known route by water called the Chicago-Desplaines-Illinois route running up the Chicago from Lake Michigan to a point on the west fork, thence westerly by water or portage, according to the season, to Mud Lake, thence to the Desplaines River near Riverside, two miles, thence down the Desplaines to the confluence of that river with the Kankakee where they form the Illinois River, thence down the Illinois River to its junction with the Mississippi. During said period the fur trade was regularly conducted upon the Desplaines River and supplies for the early settlers were transported in large quantities between Chicago and St. Louis by canoes and other boats of light draft. The American Fur Company navigated this route until about 1825 after which it was disused.

Since 1835 a number of dams have been built in the Desplaines and a considerable number of bridges span the river, but these obstacles are not founded on any authority from Congress or the State. The opinion was delivered by Mr. Justice Pitney who said:

> The public interest in navigable streams of this character in Illinois and neighboring states, and the Federal authority over such as are capable of serving commerce among the states, do not arise from custom or implication, but have a very definite origin. By Article 4 of the compact in the Ordinance of July 13, 1787, for the government of the territory northwest of the river Ohio, it was declared: "The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the Confederacy, without any tax, impost or duty therefor."

The learned Justice cited the various provisions of the Acts of Congress affirming the above quoted provisions of the ordinance of July 13, 1787, and said:

> There can be no doubt that the waters of the Chicago-Desplaines-Illinois route "and the carrying places between the same" constituted one of the routes of commerce intended by the ordinance and the subsequent acts referred to, to be maintained as common highways. It did not make them navigable in law unless they were navigable in fact, but declared the public rights therein so far as they were navigable in fact; and it is curious and interesting that the importance of these inland waterways, and the inappropriateness of the tidal test in defining our navigable waters, were thus recognized by the Congress of the Confederation more than eighty years before the court decided The Daniel Ball, 10 Wall, 557, 563, and more than sixty years before The Genesee Chief v. Fitzhugh, 12 How. 443, 455.

Discussing the character of the ordinance of 1787, it was held to establish public rights of highway in navigable waters not capable of repeal by the States. As to the question of navigability the opinion says (approving the Ball case):

> The test is whether the river, in its natural state, is used, or capable of being used, as a highway for commerce, over which trade and travel is or may be conducted in the customary modes of trade and travel on water. Navigability, in the sense of the law, is not destroyed because the water course is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water.

The attention of the court had been called to the fact that the Supreme Court of Illinois had held that the Desplaines in its natural condition was not a navigable stream and that a writ of error brought to review that decision was dismissed by the Supreme Court because no federal question was involved. In regard to that decision the opinion says:

> Of course the decision does not render the matter res judicata, as the United States was not a party. The district court in the present case treated it as not persuasive, because it appeared that evidence was wanting which is present here; and we cannot say that the court below erred in not following it.

As to the effect of the non-user of the stream the learned Justice said:

> The Desplaines river, after being of practical service as a highway of commerce for a century and a half, fell into disuse, partly through changes in the course of trade or methods of navigation, or changes in its own condition partly as the result of artificial obstructions. In consequence, it has been out of use for a hundred years; but a hundred years is a brief space in the life of a nation; improvements in the methods of water transportation, or in-

creased cost in other methods of transportation, may restore the usefulness of this stream; since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition, and require only the exertion of Federal control to make them again important avenues of commerce among the states. If they are to be abandoned, it is for Congress, not the courts, so to declare. The policy of Congress is clearly evidenced in the Act of 1899, and, in the present case at least, nothing remains but to give effect to it.

The case was argued for the United States by Mr. Clarence N. Goodwin as Special Assistant to the Attorney General, and by Mr. Frank H. Scott for the Power Company.

Res Judicata

Oklahoma v. Texas, Adv. Ops. p. 475.

The State of Oklahoma filed a bill in the Supreme Court of the United States to establish the boundary line between that State and Texas. The bill averred that the third article of a treaty concluded February 22, 1819, ratified and proclaimed February 19, 1821, between the United States of America and the King of Spain, established the boundary line between Texas, then a part of Mexico, and the United States, as following the south branch of the Red River; that after Mexico had become independent a treaty was concluded in 1821 and ratified and approved in 1832 between the United States of America and the United Mexican States, by which the validity of the Spanish treaty was confirmed; that in 1837 Texas was recognized as an independent republic and in April 1838 a treaty concluded, ratified and proclaimed between the United States and the Republic of Texas by which the boundary thus established was accepted by the Republic of Texas as binding; that in 1845 Texas was admitted to the union as a State with the territory properly included within and rightfully belonging to the Republic of Texas; that by the Act of Congress approved May 2, 1890, establishing a temporary government for a part of the territory adjoining the State of Texas on the north under the name of the Territory of Oklahoma, the existence of a controversy between the United States and the State of Texas as to ownership of the land lying between the north and south forks of the Red River was recognized and it was provided that the act should not apply to such territory until the title should be adjudicated and determined to be in the United States, and that by said act the Attorney General was authorized and directed to commence in the name and on behalf of the United States and to prosecute to final determination a suit in equity in the Supreme Court against the State of Texas. Such suit was filed in 1895 and after a full hearing the Supreme Court found and decreed that the territory east of the 100th meridian of longitude west and south of the river now known as the north fork of the Red River, along the south bank of the Red River and of the south fork of said river, did not belong to the State of Texas but was within the exclusive jurisdiction of the United States. In 1906 by Act of Congress the Territory of Oklahoma and Indian Territory were admitted into the Union as the State of Oklahoma.

The State of Texas appeared in the instant case and asserted that the treaty by its legal meaning and effect fixed the boundary line between Texas and the United States in the middle of the main channel of the Red River and of the south fork of that River. The United States by leave of court intervened and set up its interest as trustee of Indian allottees with respect to certain portions of the bed of the Red River, and as owner in its own right of a large part of the bed and of numerous islands therein, and supported the contentions of the State of Oklahoma as to the true construction of the treaty of 1819 and as to the effect of the final decree in United States v. Texas. At the same time it was brought to the attention of the court that, because of the recent discovery and development of gas and oil deposits in the bed of the river in the land in dispute, serious conflict had arisen between parties claiming title from the State of Texas and others claiming title from the State of Oklahoma, and that there was danger of the exhaustion of the gas and oil deposits pending the determination of the questions at issue between the parties and danger of conflict between claimants under them, and thereupon, on motion of the United States concurred in by the State of Oklahoma and consented to by the State of Texas, a receiver was appointed to take possession of that part of the river bed lying between mid-channel and the south bank and within the disputed oil field. Testimony was taken and returned and the question to be decided was stated by the court as follows:

> (1) Is the decree of this court in United States v. Texas, 162 U. S. 1, final and conclusive upon the parties to this cause in so far as it declares that the Treaty of 1819 between the United States and Spain fixed the boundary along the south bank of the Red River?
>
> (2) If said decree is not conclusive, then did the Treaty of 1819 construed in the light of pertinent public documents and acts, fix the boundary along the mid-channel of Red River, or along the south bank of said river?

Mr. Justice Pitney delivered the opinion of the court.

In regard to the question of res judicata he said:

> The general principle, applied in numerous decisions of this court, and definitely accepted in Southern Pacific R. Co. v. United States, 168 U. S. 1, 48, 49, is that a question of fact or of law, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties *sui juris*, is conclusively settled by the final judgment or decree therein, so that it cannot be further litigated in a subsequent suit between the same parties or their privies, whether the second suit be for the same or a different cause of action. As was declared by Mr. Justice Harlan, speaking for the court in the case cited (p. 49): "This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

The parties stipulated that the entire record in the former decision of the Supreme Court should be considered in evidence for all purposes. Upon an examination of this record the court declared that the jurisdiction of the court over the subject matter was put in issue by demurrer to the bill in that case, decided in favor of the jurisdiction and set at rest by the making of the final decree. Jurisdiction of the court over the parties was declared to be conclusively established by the appearance of both parties and participation in the pleadings and the hearing. Identity of parties was declared to exist between the former suit and the

present one so far as concerns the proprietary interest involved, and as to governmental jurisdiction the State of Oklahoma was declared to have succeeded to the title and rights formerly held by the United States and therefore to be in privity with it. It therefore remained only to consider whether the "right, question or fact" now in controversy, namely, the location of the boundary line with respect to the course of the Red River was put in issue and directly determined in the former case and it was held that that very question was so put in issue and determined.

The opinion contains a most interesting historical review of the various treaties, the negotiations of the contracting parties, the entries in Mr. Adams' diary and other historical documents, and if serious doubt ever did exist as to the scope of the former decision, that doubt is wholly dissipated by the review of the evidence which the learned writer of the opinion sets forth.

Having decided, therefore, that the decree was res judicata, the court declared it unnecessary to consider any of the questions discussed as to the proper construction of the treaties and ordered a decree submitted for the carrying of the decision into effect.

This case is another in that notable series of cases where the jurisdiction of the Supreme Court of the United States has been exercised to determine, between sovereign states, boundary line disputes and other controversies which might have resulted in war between the states unless in the Articles of Confederation and in the Constitution such controversies had been made a matter of judicial cognizance and a tribunal designated to decide them according to law and justice. Such a surrender of state sovereignty to the judicial department has never in our history been found to be injurious or derogatory to the dignity or self respect of the State governments. It has always stood and will always stand as a living argument in support of those who have endeavored to minimize the chances of war by the substitution of justice for force in controversies between nations.

The case is perhaps unique in respect to the method and extent of the use of a receivership in such a controversy.

The case was argued by Mr. S. P. Freeling for the State of Oklahoma, by Messrs. C. M. Cureton and Thomas Watt Gregory for the State of Texas, by Mr. Leslie C. Garnett for the United States and by the Messrs. Leslie Weldon Bailey and A. H. Carrigan for the landowners.

Safety Appliance Act.—Proximate Cause.

Lang, Admx. v. New York Central Railroad Co., Adv. Op. p. 465.

This action invoked the Federal Safety Appliance Act as the ground for recovery. Sec. 2 of that act declared that it should be unlawful to use in interstate commerce any car not equipped with an automatic coupling device which should operate by impact and which would not require any one to go between the ends of cars to uncouple them. Plaintiff's intestate was a brakeman on a freight train of the defendant railroad company. He was on the front end of three cars being "kicked" to a sidetrack on which a loaded crippled car had been switched preparatory to being unloaded. In the discharge of his duty to stop his cars before they should reach the crippled car, he took up his position on the front end of the forward car and applied the brakes, but did not succeed in stopping them. While thus engaged the cars came together and because of the lack of a bumper and coupling apparatus on the crippled car the brakeman's feet and legs were crushed and he subsequently died from these injuries. If the crippled car had been equipped with a proper draft bar, coupler and bumper, the collision wold not have resulted in injury. He knew the condition of the crippled car and had no duty in relation to it except to keep away from it.

The trial court entered judgment upon a verdict of $18,000 in favor of the plaintiff and denied a motion for a new trial. The Appellate division sustained the judgment by a divided court. The Court of Appeals of the State of New York reversed the judgments and directed the complaint to be dismissed. The case was brought to the Supreme Court of the United States by certiorari.

The plaintiff contended and the trial court held that the defective car "was in use" within the meaning of the statute, that such use without such equipment was "unlawful" and was the proximate cause of the injury, relying on the Layton case (243 U. S. 617). The defendant contended that "the proximate cause of the accident was the failure of the deceased to stop the cars before they came in collision with the defective car. The absence of the coupler and drawbar was not the proximate cause of the injury, nor was it a concurring cause;" and relied on the Conarty case (238 U. S. 243) and this contention was upheld by the New York Court of Appeals. The determination of the proximate cause of the injury was therefore the pivotal point of the case.

The prevailing opinion was delivered by Mr. Justice McKenna. The learned Justice reviewed the Layton case and quoted with approval its declaration that the Safety Appliance Act

> "makes it unlawful for any carrier engaged in interstate commerce to use on its railroad any car not equipped as therein provided,"

and that by this legislation

> "the qualified duty of the common carrier is expanded into an absolute duty in respect to car couples" and by an omission of the duty the carrier incurs "a liability to make compensation to any employee who is injured by it."

In the language next quoted the learned Justice discloses his point of departure from the view of the trial court and the point of debate between the prevailing and dissenting opinions:

> But necessarily there must be a casual relation between the fact of delinquency and the fact of injury, and so the case declares. Its concluding words are, expressing the condition of liability, "that carriers are liable to employees in damage whenever the failure to obey these Safety Appliance Laws is the proximate cause of injury to them when engaged in the discharge of duty." The plaintiff recovered because the case came, it was said, within that interpretation of the statute. . . .
>
> There is no doubt of the duty of a carrier under the statute and its imperative requirement, or of the consequences of its omission. But the inquiry necessarily occurs, to what situation and when, and to what employees, do they apply? . . .

Turning from the law to the facts, the prevailing opinion says:

> In this case the movement of the colliding car was in the daytime, and the situation of the defective car was not only known and visible, but its defect was known by Lang. He therefore knew that his attention and efforts were to be directed to prevent contact with it. He had no other concern with it than to avoid it. "It was not," the trial court said, "the intention of any of the crew (of

the colliding car) to disturb, couple onto, or move the crippled car."

And in regard to the application of the doctrine of proximate cause to the facts it is said:

> It was the duty of the crew . . . and of Lang to stop the colliding car, and to set the brakes upon it "so as not to come into contact with the crippled car" . . . That duty he failed to perform and if it may be said that notwithstanding he would not have been injured if the car collided with had been equipped with drawbar and coupler, we answer, as the court of appeals answered: "Still the collision was not the proximate result of the defect." Or, in other words, and as expressed in effect in the Conarty Case, that the collision under the evidence cannot be attributable to a violation of the provisions of the law, "but only had they been complied with, it (the collision) would not have resulted in the injury to the deceased."

Mr. Justice Clarke dissented and with him concurred Mr. Justice Day.

The dissenting opinion emphasizes the provisions of the Safety Appliance Act of Congress, which declares it to be "unlawful" for an interstate carrier to use on its line any car not equipped with automatic couplers, and that any employee injured by any car not so equipped should not be held to have assumed the risk of injury by continuing to work after the unlawful use of such a car had been brought to his knowledge, and that in such case no employee should be held to be guilty of contributory negligence nor to have assumed the risk of his employment. The dissent was based upon the proposition that the purpose of the legislation referred to was to "supplant the qualified duty of the common law with an absolute duty." The learned justice insisted that by the use of cars not complying with the standards thus declared, railroads incurred a liability to make compensation to one injured as a consequence of such use; that the duty was absolute and that the penalty could not be escaped merely by "the exercise of reasonable care." He cited many cases supporting his main proposition which he phrased as follows:

> It is plain that the principle of the cases quoted from is, that carriers should be held liable to employees in damages whenever failure to obey the Safety Appliance Laws is the proximate cause of injury to them when engaged in the discharge of their duty.

In answer to the postulate of the prevailing opinion that the car in question was "out of use," he said:

> It seems to be the theory of the opinion of the court that, because the conductor realized the danger there was in the defective car, and aimed to avoid moving it, therefore it was not "in use" by the company within the meaning of the Safety Appliance Acts.
>
> But a car in such dangerously defective condition as this one was, which, for convenience in unloading, was kept for days, perhaps for weeks, in a yard so crowded that it was necessary to move it from time to time in the ordinary yard switching, cannot reasonably be said to have been "out of use" during that time. To allow such a car to be placed upon an unloading track, so short and crowded that a slight excess of speed in moving other cars, or a slight defect in the brakes, or a moment of delay in applying them, might result, as it did in this case, in the injury or death of employees, cannot reasonably be said to be keeping such a car "out of use." As a matter of fact, the defective car was actually in use in a most real and familiar way on the very day of the accident; for, on that day, the unloading of it, which had been commenced before, was completed while it was on the "house track" on which the accident occurred. . . .
>
> It would be difficult to conceive of a case in which the negligence of the master could be a more immediate and proximate cause of injury to a servant than it was in this case.

The case was urged by Mr. Hamilton Ward for plaintiff in error and by Mr. Maurice C. Spratt for defendant in error.

Workmen's Compensation Act.—Discrimination

Lower Vein Coal Co. v. *Industrial Board of Indiana,* Adv. Ops. p. 383.

Prior to 1919 Indiana had a Workmen's Compensation Act which was elective. In 1917 it was amended so as to exempt railroad employees engaged in train service from its provisions. In 1919 it was made mandatory as to all coal mining companies in the state and as to municipal corporations. It still remained permissive as to all other employers.

The coal company brought suit in the District Court of Indiana to enjoin the enforcement of the compulsory provisions of the amended act.

Mr. Justice McKenna delivered the opinion of the court and stated that the sole question presented by the act was the validity of those provisions which made it compulsory as to coal companies and permissive as to all others, the claim being that there were other employments equally as hazardous as coal mining as to which the act was not made compulsory; that it did not apply at all as to railroad train men and that the classification therefore rested on no sound or just basis. On the trial of the case a wealth of statistical detail was given as to the methods of coal mining; the causes of accidents, the nature of the risks of employees and the number of casualties and deaths, as well as similar statistics as to other industries, concerning which the opinion said "the length and character of the report and tables of statistics preclude summary."

The opinion declares that these controversies of fact and the controversies as to the appropriate remedies for them

> were matters for the legislative judgment and that judgment is not open to judicial review. . . . Legislation is impelled and addressed to concrete conditions deemed or demonstrated to be obstacles to something better . . . dependent in the legislative consideration upon their distinctions in some instances, upon their identities in others, and . . . associated or separated in regulation. And this is the rationale of the principle of classification and of the cases which are at once the results and illustrations of it.

It was also claimed that the law discriminated because it included within its terms all the company's employees whether engaged in the hazardous part of the business or not; that if it might be justified as to those who work underground, it could not be justified as to those who worked above ground. In reply to this contention the court said:

> The contention has a certain speciousness, but cannot be entertained. It commits the law and its application to distinctions that might be very confusing in its administration, and subjects it and the controversies that may arise under it to various tests of facts, and this against the same company.

Certain employers' liability acts and the cases in adjudication thereof were cited and distinguished. Speaking of these two classes of acts the court said:

> They both provide for reparation of injuries to employees, but differ in manner and effect; and there is something more in a compensation law than the element of hazard,—something that gives room for the power of classification which a legislature may exercise in its judgment of what is necessary for the public welfare . . . and which cannot be pronounced arbitrary because it may be disputed and "opposed by argument and opinion of serious strength."

Decree of Indiana District Court affirmed.

JOURNAL

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Office: 1612 First National Bank Bldg., 38 South Dearborn Street, Chicago, Illinois

EDWARD DOUGLASS WHITE

The ninth Chief Justice of the Supreme Court of the United States has pronounced his last judgment.

The record of his life is now before that great tribunal which men call History and there will be no dissent from the opinion which will there be recorded.

To the service of the ministry of Justice, in its greatest temple, he gave a mind richly endowed with wisdom, a soul dauntless for the right as he saw it, and a heart so warm and generous that the austerity of his high position was tempered by a rare considerateness and an exquisite courtesy.

WILLIAM ALEXANDER BLOUNT

News of the greatly regretted and unexpected death of President Blount came just as the JOURNAL was going to press, and hence too late for proper editorial notice. We trust in a subsequent number to have such mention as the death of one who was honored with the highest position within the gift of the Association naturally requires.

THE BAR AND THE ELECTION OF JUDGES

It is a truism that judges should be chosen according to fitness and capacity and not because of their political affiliations. It would be universally considered an outrageous offense for a judge, in making up his decision, to take into consideration whether the parties litigant belonged to his own or another political party, and yet the conscience of the community has not yet reached the point of wholly ignoring such a question in deciding how to vote for rival candidates for judicial office nominated by party machinery and placed on the ballot in party columns. There can be no doubt that when the judicial candidates are on the same ballot as the candidates for political office, party ascendancy, and not superior fitness, frequently determines the choice.

It ought to be the particular duty of the bar to uphold the vitally important principle of non-partisanship in the selection of judges and to advocate the re-election of those who have proved their fitness for the great tasks committed to the judicial department. Unless this duty is performed it will be impossible to preserve a free and non-partisan bench. In the smaller communities such a task is comparatively easy. Men and women have a more general acquaintance with judges and judicial candidates, and the lawyer is more truly the adviser of the community. His advice is more effectively given and more willingly received. Undoubtedly the bar has great influence in such communities upon the nomination and election of judges.

In the large cities, however, the condition is otherwise. The political parties are more intensely organized. They are able to control the nomination of candidates more completely than in the smaller communities. The citizen does not generally participate in the making of such nominations, and even the lawyer, who is more vitally interested than anyone else in the election of fit judges, has little influence in selecting the party nominees. To such a pass have we arrived that there is, generally speaking, no such thing as the election of judges by popular vote in the larger cities. The vote is but a choice between candidates, neither of whom may be qualified. In such circumstances we have that worst of all systems—appointment to judicial office by those least able to appoint according to merit, and least willing to apply the principles of non-partisanship.

Recent events in Chicago have emphasized the importance of guarding the bench and have demonstrated that the bar, properly organized and fully awakened to a plainly visible danger, can be relied upon to respond to the call of duty and can be the decisive factor in the defeat of those who threaten the independence and integrity of the bench, but the application of such vitally important principles as election acording to fitness and the stability of the tenure of office of those who have been found to possess such fitness, ought not to rest upon an uncertain basis. It ought not to re-

quire a gross attack upon the judicial institution which threatens its destruction, to arouse a movement in support of these principles.

In many communities judges are appointed for life, or good behavior, by executive authority. The arguments against this method are of course familiar and rest upon the fact that there are times when the executive is as careless of his duty as are the political bosses. The objections to such method of appointment are removed by limiting the right of the executive to appoint only from a list of qualified persons recommended to him by a body properly constituted for the purpose. Massachusetts is a notable instance of the successful operation of such a system.

In the debates on this subject in recent Constitutional Conventions, a suggestion has been made that the Governor should appoint from a list of persons certified to him by the judges of the Supreme Court, they in turn to select from lists of qualified persons certified to them by the *nisi prius* courts. If any such system be adopted, ought not the lawyers of the community to be the persons who from their own number select and certify to the courts or to the appointing power those whom they regard as qualified for judicial service?

PROGRAM OF CINCINNATI MEETING

We print in this issue the program of the Forty-fourth Annual Meeting of the Association. The gentlemen charged with the important duty of arranging it are to be congratulated upon the success of their efforts. There is a great deal more difficulty in arranging a rounded and satisfactory program for an important meeting lasting several days than appears to one who simply peruses the finished product. The one we are printing shows how well these difficulties have been overcome.

It presents a prospect of real profit and pleasure to those members who decide to attend. The list of distinguished speakers is alone a guarantee that they will be richly repaid; and when to this is added the advantage of the discussions of important subjects with which Sections and Committees and associated bodies concern themselves, the argument for attendance, to those who can possibly do so, would seem to be overwhelming.

A program for a meeting of several days naturally demands provision for recreation. Those who go to Cincinnati may rest assured that delightful opportunities for relaxation will be presented. That city has many places and objects of interest which will repay a visit; and there is to be an all-day excursion to Dayton, Ohio, which promises to be very entertaining.

As stated in the last issue, arrangements have been made for a reduced railroad rate for members and the dependent members of their families. The method by which this reduced rate can be secured is given in a statement from a railroad source, reprinted in this issue in connection with the program of the meeting. Those contemplating attendance would do well to read it carefully; also the information about hotel accommodations.

THE KANSAS EXPERIMENT

In another column will be found an article on the Industrial Court of Kansas, written by a distinguished jurist who had much to do with the drafting of the statute, with its creation, and with the administration of its work.

This article will be followed by another written by an able and sincere critic of the law. The formal debate in these columns will then be closed by a rejoinder to be written by an advocate of the law and a believer in the success of the experiment.

This experiment is one of the utmost importance and interest to the profession. If it proves to be a success it will have enlarged the judicial domain to dimensions never before attained, and will have substituted justice for force in that portion of the industrial field which is declared to be affected by the public interest. It may be destined to be a failure. It may not be an effective method of securing a cessation of industrial strife, or it may not be worth the price.

The question of success or failure cannot be decided by academic argument alone. That question will be decided by the manner in which the experiment is worked out.

The Kansas Industrial Court is now the laboratory where theory is being put to practical test.

CONTRIBUTIONS

The board of editors wish the members of the Association to feel that the Journal is a forum in which every question of broad interest to the profession in general may be discussed. Articles and letters are welcomed and those who send them may be assured that they will receive prompt and careful attention.

Articles cannot always be published in the number following their acceptance. Those who send them, however, may rest assured that material which is found available will appear at the earliest possible date.

PROGRAM OF ANNUAL ASSOCIATION MEETING

Cincinnati, Ohio, August 31 and September 1 and 2

MEETINGS

All meetings of the Association except on Wednesday evening will be held in the Ball Room at the Hotel Sinton. The Wednesday evening meeting will be held in Convention Hall, Hotel Gibson.

The Executive Committee will meet on Tuesday, August 30, at 8:30 p. m., in Parlor F (Mezzanine Floor), Hotel Sinton.

The General Council will meet in the Parlor F (Mezzanine Floor), Hotel Sinton. The first meeting of the General Council will be held on Wednesday, August 31, at 9:00 a. m.

REGISTRATION

The Offices of the Secretary and Treasurer will be located in the Hotel Sinton, Tea Room, (Main Floor) and will open for registration of members and delegates and for the sale of dinner tickets, on Monday morning, August 29, at 10:00 o'clock.

BUSINESS PROGRAM OF THE ASSOCIATION

Wednesday Morning, August 31, at 10 O'clock

Ball Room (Main Floor) Hotel Sinton.

Addresses of welcome on behalf of Ohio State Bar Association: Harry J. Davis, Governor of Ohio, and John Galvin, Mayor of Cincinnati.

Announcements.

Report of the Secretary.

Report of the Treasurer.

Report of the Executive Committee.

Nomination and Election of Members.

The President's Address.

Address by Sir John Simon, of London, England, former Attorney General and Secretary of State for Home Affairs.

State delegations will meet in the Ball Room (Main Floor) Hotel Sinton at the CLOSE of this session to nominate members of the General Council, and to select nominees for Vice-President and Local Council for each State.

Wednesday Afternoon, August 31, 2:00 O'clock

Ball Room (Main Floor) Hotel Sinton.

2:00 p. m. Annual Business Meeting of Ohio State Bar Association.

4:00 p. m. Joint Session of American Bar Association and Ohio State Bar Association. Address by Harry M. Daugherty, Attorney-General of the United States.

Wednesday Evening, August 31, at 8:00 O'clock

Convention Hall, Hotel Gibson.

Address: "Our Brethren Overseas," John W. Davis, of New York, former Ambassador to Great Britain.

Presentation of Memorial Minute upon the late Chief Justice of the United States.

Election of the General Council.

9:30 p. m. Reception in the Ball Room (Main Floor) Hotel Sinton.

Thursday Morning, September 1, at 10:00 O'clock

Ball Room (Main Floor) Hotel Sinton.

Reports of Sections and Committees. The names of Chairmen are given below.

The consideration of the Reports will begin promptly at 10:05 o'clock.

SECTIONS

10:05 a. m. Comparative Law. Robert P. Shick.
10:10 a. m. Judicial Section. Charles A. Woods.
10:20 a. m. Legal Education. Elihu Root.
10:30 a. m. Patent, Trade-Mark and Copyright Law. A. C. Paul.
10:40 a. m. Public Utility Law. Bentley W. Warren.
10:50 a. m. National Conference of Commissioners on Uniform State Laws. Henry Stockbridge.
11:00. a. m. Conference of Bar Association Delegates. Stiles W. Burr.

COMMITTEES

11:10 a. m. Professional Ethics and Grievances. Edward A. Harriman.
11:20 a. m. Commerce, Trade and Commercial Law. Francis B. James.
11:40 a. m. International Law. Charles Noble Gregory.
11:50 a. m. Insurance Law. Arthur I. Vorys.
12:00 m. Publicity. Martin Conboy.
12:10 p. m. Memorials. W. Thomas Kemp.
12:15 p. m. Jurisprudence and Law Reform. Everett P. Wheeler.
1:00 p. m. *Adjournment.*
2:30 p. m. Excursion (to be announced later).

Thursday Evening, September 1, at 8:00 O'clock

Ball Room (Main Floor) Hotel Sinton.

Address: "Without a Friend," Charles S. Thomas, of Colorado, former United States Senator.

Reports of Committees. The names of Chairmen are given below.

9:15 p. m. Admiralty and Maritime Law. Robert M. Hughes.
9:25 a. m. Noteworthy Changes in Statute Law. Thomas I. Parkinson.
9:35 p. m. Drafting of Legislation. William Draper Lewis.
9:40 p. m. Uniform Judicial Procedure. Thomas Wall Shelton.
9:50 p. m. *Adjournment.*

Friday Morning, September 2, at 10:00 O'clock

Ball Room (Main Floor) Hotel Sinton.

A Symposium on the general subject "The Administration of Criminal Justice," under three subtopics as follows:

10:05 a. m. "Unenforceable Law," by Raymond B. Fosdick, of New York.

10:30 a. m. "The Illegal Enforcement of Criminal Law," by Luther Z. Rosser, of Georgia.
10:55 a. m. "The Adjustment of Penalties," by Marcus A. Kavanaugh, of Illinois.
11:25 a. m. General Discussion by Association.
12:45 p. m. Nomination and Election of Officers. Adjournment at 1:00 o'clock.

Friday Afternoon, September 2, at 2:30 O'clock

Reports of Committees. The names of Chairmen are given below.

2:35 p m. Membership. Frederick E. Wadhams.
2:45 p. m. Change of Date of Presidential Inauguration. William L. Putnam.
3:00 p. m. Classification and Restatement of Law. James D. Andrews.
3:15 p. m. Legal Aid Work. Reginald Heber Smith.
3:30 p. m. Aviation. Charles A. Boston.
Miscellaneous Business.
Adjournment *sine die*.

Friday Evening, September 2

Annual Dinner at 7:00 p. m. (See later announcements.)

Dinner to Ladies at 7:00 p. m.

Saturday, September 3

All day *Excursion* to Dayton, Ohio.

HOTEL ACCOMMODATIONS IN CINCINNATI, OHIO

(All hotels European plan, except as stated. Prices named are per day.)

Name	Location	Single room and bath	Double room and bath
Hotel Gibson ..	4th and Walnut...	$2.50 up	$4.25 up
Hotel Sinton .	4th and Vine.....	3.50 up	5.50 up
Havlin Hotel..	Vine & Opera Pl..	3.00 up	5.00 up
Hotel Metropole	6th and Walnut...	2.50 up	4.50 up
Grand Hotel .	4th and Central...	2.50 up	4.00 up
Palace Hotel .	6th and Vine.....	2.00 up	3.00 up
Emery Hotel .	421 Vine	2.50	4.50
Hotel Alms .. (Amer. plan)	McMillan & Alms Place	4.00	7.00

Mr. Ben B. Nelson, Fourth National Bank Building, Cincinnati, Ohio, has charge of reservations for members and guests. In writing to Mr. Nelson please state:

a. Preference of hotels;
b. Time of arrival;
c. Period for which rooms are desired;
d. Whether single or double room desired;
e. How many persons will occupy each room.

Members who wish to do so are at liberty to make direct arrangements with hotel preferred.

Make your reservations early. Notify Mr. Nelson promptly of any cancellations.

Arrangements have been made with the Railroads whereby members of the American Bar Association and dependent members of their families who attend the annual meeting will have the benefit of A FARE AND ONE-HALF. They will pay *full fare going to Cincinnati*, and, upon purchasing railroad ticket, will ask for a certificate, which will be viséd by the Secretary at Cincinnati, thus entitling the holder to *half fare on the return trip*. Further details of the plan are given in the following statement furnished by an official of the Central Passenger Association. The dates for ticket sales will, of course, vary in the different Passenger Association territories:

The following directions are submitted for your guidance:

1. Tickets at the regular one-way tariff fare for the going journey may be obtained on any of the following dates (but not on any other date) Aug. 23-24 and Aug. 27-Sept. 2, 1921. Be sure that, when purchasing your going ticket, you request a CERTIFICATE. *Do not make the mistake of asking for a "receipt."*

2. Present yourself at the railroad station for ticket and certificate at least thirty minutes before departure of train on which you will begin your journey.

3. *Certificates are not kept at all stations.* If you inquire at your home station, you can ascertain whether certificates and through tickets can be obtained to place of meeting. If not obtainable at your home station, the agent will inform you at what station they can be obtained. You can in such case purchase a local ticket to the station which has certificates in stock, where you can purchase a through ticket and at the same time ask for and obtain a *certificate* to the place of meeting.

4. Immediately upon your arrival at the meeting present your certificate to the endorsing officer, Mr. W. Thomas Kemp, as the reduced fare for the return journey will not apply unless you are properly identified as provided for by the certificate.

5. It has been arranged that the Special Agent of the carriers will be in attendance on August 31-September 2, from 8:30 a. m. to 5:30 p. m., to validate certificates. If you arrive at the meeting and leave for home again prior to the Special Agent's arrival, or if you arrive at the meeting later than September 2, after the Special Agent has left, you cannot have your certificate validated and consequently you will not obtain the benefit of the reduction on the home journey. It is inferred that you will wish to attend all the sessions of the convention, and that you will, if possible, be present commencing the opening date of the meeting. However, so far as the validation of certificates is concerned, you should so time your going trip as to enable you to present certificate for validation prior to departure of the Special Agent of the railroads on the last validation date above named, for, while provision is made for validation of certificates if the required minimum of 350 are presented, as explained in the next paragraph, a reduced fare ticket on the return trip is obtainable only upon surrender of a validated certificate. Certificates will be validated only on the dates above named, and during the office hours indicated. *No refund of fare will be made on account of failure to either obtain a proper certificate nor on account of failure to have the certificate validated.*

6. So as to prevent disappointment, it must be understood that the reduction on the return journey is not guaranteed, but is contingent on an attendance of not less than 350 members of the organization at the meeting and dependent members of their families, holding regularly issued certificates obtained from ticket agents at starting points, showing payment of regular one-way tariff fare of not less than 67 cents on going journey.

7. If the necessary minimum of 350 certificates are presented to the Special Agent, and your certificate is duly validated, you will be entitled up to and including Sept. 6 to a return ticket via the same route over which you made the going journey, at one-half of the regular one-way tariff fare from the place of the meeting to the point at which your certificate was issued.

8. Return ticket issued at the reduced fare will not be good on any limited train on which such reduced fare transportation is not honored.

Commissioners on Uniform State Laws

Program of Thirty-First Annual Conference, at Cincinnati.

The thirty-first annual meeting of the National Conference of Commissioners on Uniform State Laws will be held in Cincinnati, Ohio, August 24 to 30, 1921, at the Hotel Gibson (Convention Hall), just preceding the meeting of the American Bar Association.

Following is the TENTATIVE PROGRAM:

Wednesday, August 24

10:00 A. M. Meeting of the Executive Committee.

2:00 P. M. FIRST SESSION.
Address of Welcome.
Response of the President.
Roll Call.
Reading of the Minutes of the Last Meeting.
Report of the Secretary.
Report of the Treasurer.
Report of the Executive Committee.
Appointment of Nominating Committee.
Appointment of Auditing Committee.

8:00 P. M. SECOND SESSION.
Reports of Standing Committees:
Scope and Program Committee
Publicity Committee
Legislative Committee
Committee on Appointment of and Attendance by Commissioners.
Presentation and consideration of the reports of the following special committees not presenting drafts of Acts:
Insurance
Prohibition
Drug Law
Securing Compulsory Attendance of Non-Resident Witnesses in Civil and Criminal Cases.
Automobile Legislation
One Day's Rest in Seven
Depositions and Proof of Statutes
Tribunal to Settle Industrial Disputes
Cooperation with the American Judicature Society
Cooperation with the American Institute of Criminal Law and Criminology
Uniformity of Judicial Decisions
Occupational Diseases
Registration of Title to Land
Primary Law for Federal Officers.
Marriage and Divorce.
Report of Nominating Committee.
Election of Officers.

Thursday, August 25

9:30 A. M. THIRD SESSION.
Consideration of Eighth Tentative Draft of a Uniform Incorporation Act.

2:00 P. M. FOURTH SESSION.
Consideration of Eighth Tentative Draft of a Uniform Incorporation Act.

8:00 P. M. FIFTH SESSION.
Consideration of:
Eighth Tentative Draft of a Uniform Incorporation Act.
Report of Commercial Law Committee on amendments to the Warehouse Receipts and Bills of Lading Acts.
Report of Commercial Law Committee on a Blue Sky Law.

Friday, August 26

9:30 A. M. SIXTH SESSION.
Consideration of First Tentative Draft of a Uniform Fiduciaries Act.

2:00 P. M. SEVENTH SESSION.
Consideration of First Tentative Draft of a Uniform Fiduciaries Act.

8:00 P. M. EIGHTH SESSION.
Consideration of First Tentative Draft of an Act relating to the Status and Protection of Illegitimate Children.

Saturday, August 27

9:30 A. M. NINTH SESSION.
Consideration of Second Tentative Draft of a Uniform Declaratory Judgments Act.

2:00 P. M. TENTH SESSION.
Consideration of Second Tentative Draft of a Declaratory Judgments Act.
(At 4:30 P. M. the Conference adjourns for local entertainment.)

Monday, August 29

9:30 A. M. ELEVENTH SESSION.
Consideration of First Tentative Draft of a Uniform Mortgage Act.

2:00 P. M. TWELFTH SESSION.
Consideration of First Tentative Draft of a Uniform Aviation Act.

8:00 P. M. THIRTEENTH SESSION.
Consideration of Report of the Committee on Compacts Between States.

Tuesday, August 30

Unfinished business.

HOTEL ACCOMMODATIONS

The Headquarters of the Conference will be at the Hotel Gibson, 4th and Walnut Streets, Cincinnati. The Headquarters of the American Bar Association will be at the Hotel Sinton, directly across the street from the Hotel Gibson. Commissioners may engage rooms at either hotel with equal convenience.

The rates at the Hotel Gibson are as follows:
Single room with shower bath.....$2.50 and up
Single room with tub .....2.75 and up
Double room with tub.....$5.00 and up
Double room with tub and shower combined .....$6.00 and up

The rates at the Hotel Sinton are substantially the same.

A Uniform Mortgage Law

The National Conference of Commissioners on Uniform State Laws at its last Conference appointed a Committee to draft a Uniform Mortgage and Mortgage Foreclosure Act. There would be many advantages in having a uniform law governing mortgages in the different States.

S. R. Child, chairman of the Committee, and Donald E. Bridgeman, draftsman, appointed to prepare a tentative draft, both of Minneapolis, are at work on a form of the Uniform Mortgage Act to be presented to the next Conference at Cincinnati, August 24 to 30. They would be glad of any suggestions as to the desirability or practicability of such an act as well as suggestions as to what form the same should take.

THE STATUS OF CANADA

Constitutional Evolution of Our Neighbor from Colony to Position of Nation and Coequal Member of British Empire

By The Honourable William Renwick Riddell, LL. D., F. R. S. C., Etc.,
Justice of the Supreme Court of Ontario

THE reign of George II went out in a blaze of glory; Quebec fell before the conquering arms of Britain in 1759 as did Guadeloupe. All Canada became British territory by the capitulation of Montreal in 1760 by Vandreuil. Peace was in the air, the young King George III was known to be a devoutly pious man and a sincere lover of peace, and all statesmen turned their minds to the terms to be imposed upon France and the territory to be retained. William Pulteney, Earl of Bath, whose eloquence Walpole once feared more than another man's sword, but who now was an almost extinct volcano, inspired if he did not write a "Letter to Two Great Men [Pitt and Newcastle] on the Prospect of Peace and on the Terms," in which the retention by Britain of Canada rather than of the island in the West Indies was advocated. This Letter was answered; and much discussion, public and private, ensued. Guadeloupe seemed to be carrying the day—for did she not produce £300,000 sterling worth of sugar annually while Canada was but "a few arpents of snow"?—when a new and doughty champion threw himself upon the field. Dr. Benjamin Franklin, Agent at the Court of St. James for the Province of Pennsylvania, published (1760) his celebrated "Canada Pamphlet"[1], which set out so cogently the indisputable facts, and argued with such sound logic and clear common sense, that the scale was turned; and when the time came three years later for a treaty of Peace to be signed, Guadeloupe was returned, to become intermittently and at length permanently French, and Canada remained British, thereby making possible the independence of the United States a few years later.[2]

Now, who would compare Guadeloupe to Canada?

This tremendous change in five generations in the physical status of Canada is outdone by the change in the same brief time,—as nations go,—in her political status. In 1763, King George III, under his Common Law right over conquered and ceded territory, gave his Governor at Quebec, Royal Instructions how to act; by his Royal Proclamation, he directed what laws should govern without allowing Canadians a word. Now, Canada enacts her own laws, decides her own fiscal and other policies, without interference of King or British Minister. As a great English Statesman has recently said:

> The relations of the self-governing Dominions (including Canada) to the Mother Country have for years been undergoing a great change, a transformation which is almost completed. They are no longer Colonies, but Nations, intensely conscious of their nationhood.[3]

It is the purpose of this paper to trace in outline the course of evolution and to discuss briefly the present political status of Canada. No attempt can be made to go into detail; moreover the story of one Province must be taken as typical of that of the others, for they agree in the main.[4] Let us speak of Upper Canada, Ontario.

Upper Canada had as its first settlers the United Empire Loyalists, Americans of the Thirteen Colonies, who, like their prototypes, the Cavaliers of the times of Charles I, the Jacobites of the times of James II, held their allegiance as a sacred treasure. They were not slaves, they felt, many of them, that the Colonists were not enjoying the rights of free born Englishmen, but they believed that these rights could and would be achieved by peaceful and constitutional means.

> . . . They who loved
> The cause that had been lost—and kept their faith
> To England's crown, and scorned an alien name,
> Passed into exile; leaving all behind
> Except their honor . . .
> Not drooping like poor fugitives, they came
> In exodus to our Canadian wilds,
> But full of heart and hope, with head erect
> And fearless eye, victorious in defeat;
> With thousand toils they forced their devious way
> Through the great wilderness of silent woods
> That gloomed o'er lake and stream, till higher rose
> The Northern Star above the broad domain
> Of half a continent, still theirs to hold,
> Defend and keep forever as their own,
> Their own and England's till the end of time.

But they had the instinct of self-government strongly developed. These two principles, the United Empire Loyalists brought with them into this Province: "We will never give up the old Flag," but "We must and will govern ourselves"; and these two principles are today in as vigorous life and effective activity as a century ago. They will be found to be the guiding principles of our whole national being. For a quarter of a century, the pioneers and those who followed them were too much engrossed in clearing the forest, making a home and a living for themselves and those dependent upon them, making possible a better and more comfortable life for their children, to trouble much about the government of the Province at large (full municipal government was provided for in local affairs very early). Moreover the Mother Country paid all the expense of protection and government of the Colony—her Governor and his Council, the Judges, Sheriffs, Seurveyors, Law Officers—and the people were not called on to pay anything but for local purposes (except the few shillings the legislators got for their "wages").

In 1816, however, it was determined that the Province should help to pay her own way. Now the people's money was to be spent; and naturally the people desired to have a say in not only how it should

(1) The title is "The Interest of Great Britain considered with regard to her Colonies, etc." The pamphlet is exceedingly rare (my own copy cost me £8). A second edition was printed in 1761 for Becket, with slight changes; it is also very rare. The pamphlet will be found printed in "The Works of Benjamin Franklin" in 3 vols., printed for Longman, Hurst, Rees and Orme, Paternoster Row, London, N. D. Vol. 3, pp. 89, sqq.

(2) Whether Franklin had any arrière pensée in this pamphlet we cannot be sure. That the independence of the Thirteen Colonies was likely to follow the acquisition of Canada should have been but apparently was not foreseen by the British statesmen who ignored the plain and emphatic warnings of Vergennes in that sense.

(3) The Right Honourable Viscount Milner, Secretary of State for the Colonies, in "The British Dominions Year Book, 1920," pp. 13 sqq. He goes on to say—and who may deny it?: "They have played in this war as big a part as any but the greatest powers and are entitled to look forward to a future in which they will themselves be great powers"—and they do.

(4) Upper Canada, now Ontario, was settled much as were Nova Scotia, New Brunswick and Prince Edward Island; and her constitutional history fairly parallels theirs. Lower Canada, now Quebec, is quite different in population but her constitutional history is mutatis mutandis not very different from that of Upper Canada.

be spent but who should spend it. The Englishman's money, the Canadian was quite willing to allow to be spent by those selected by an English Governor—his own, he wanted a say in. An agitation began looking toward making the executive officers responsible to the representatives of the people in the House of Assembly.[5] The Governor was an Imperial officer sent to the Province for a few years and necessarily unacquainted personally with its needs; his Executive Council were selected by himself, were responsible only to him, as he to the Colonial authorities at Westminster, nominally "the King"; they were really a permanent set of officials closely connected by blood, marriage or social ties, a "Family Compact," tending to become more and more exclusive; they reported the state and needs of the Province to the Governor naturally from their own point of view and he to the Home Government, and there can be no doubt that both Governor and (especially) the Home Government were grossly misled. The claims of the people were, of course, resisted by the official class and at length in 1837 there was open rebellion. This for the greater part of Upper Canadians was going too far; the land was

> Theirs to hold
> Defend and keep forever as their own,
> Their own and England's till the end of time.

The Lieutenant Governor sent every British soldier to Lower Canada to help to suppress the rebellion there; Upper Canadians put down the Rebellion in Upper Canada themselves.

It is not too much to say that this Rebellion came as a shock to the authorities in London; it showed that all was not right, that Canadians had not the "rights of free-born Englishmen." A very great statesman, Lord Durham, was sent out to make a personal investigation on the spot, irrespective of the more or less misleading reports of the Governors. He did so, and as a result the two Canadas were united in 1840-1 and substantial Responsible Government was granted. Thereafter the executive officers nominally selected by the Governor were, in fact, the chosen representatives of the people in the Legislative Assembly; so soon as the "Ministry" lost the confidence of the members of the Assembly they must give place to others.

While full power was given to the Canadian Parliament in internal matters affecting Canada alone, there was for a time a tendency on the part of the Home Authorities to interfere in matters of tariff, to question and object to customs duties affecting British manufactures. In 1859 this came to a "showdown." Galt, the Canadian Finance Minister, plainly said to the Imperial Secretary of State who was insisting upon a reduction of customs upon certain British goods: "We are responsible to the people of Canada; if you insist on your demand you ask us to be responsible to the people of Britain; we refuse"—and the matter dropped for the time.

The Confederation into the Dominion of Canada in 1867 of four Provinces and the addition of others made no material change in the status of Canada constitutionally—Responsible Government and complete control of her own country continued.

In 1867 came the last clash as to customs. When by the "National Policy" the customs duties were largely increased to protect Canadian manufacturers, British manufacturers were hard hit—there were many and bitter cries; many were the vaticinations that this measure would be fatal to British connection. Sir John A. Macdonald, the Canadian Prime Minister, did not hesitate to say, "So much the worse for British connection"—a renewal of the Declaration of Tariff Independence of Sir Alexander Galt a score of years before. We have had no more trouble over the matter.

Thus far Canada had obtained full control over her own country both internally and in tariff relations with the rest of the world.

In 1887, another step forward was made: there was held the first Colonial Conference of the Prime Minister of Britain and the Prime Ministers of the self-governing Dominions, to confer on matters of common interest to the British world. It was the day of small things, but one statesman at least had a glimpse of the real significance of the gathering. Lord Salisbury said:—

> We all feel the gravity and importance of this occasion. The decisions of this Conference may not be, for the moment, of vital importance; the business may seem prosaic, and may not issue in any great results at the moment. But we are all sensible that this meeting is the beginning of a state of things which is to have great results in the future. It will be the parent of a long progeniture, and distant councils of the Empire may, in some far-off time, look back to the meeting in this room as the root from which all their greatness and all their beneficence sprang.

From and after 1887, Canada not only was in full control of her own affairs, but she advised on matters affecting the whole Empire.

In 1897, another step forward was made: Canada proposed to give British goods a preference by reducing the customs dues below those of goods of other origin. Germany and Belgium protested; they had treaties with Britain entitling them to as favorable a tariff as any other country in Britain and her dependencies. Canada was,—and, for that matter, is,—in the theory of international law, a Dependency of Britain; Germany and Belgium were technically right, and their right was acknowledged by Canada. But at the meeting of the Colonial Conference in 1897, Sir Wilfrid Laurier, our Prime Minister, insisted that the obnoxious treaties should be denounced, and denounced they were; whereupon the "British Preference" became a fact.[6]

Canada thus passed beyond her former limits; not only did she frame her own tariff, she caused the Mother Country to change her tariff treaty arrangements.

In 1907, the Colonial Conference came to an end. It was seen and felt that the word "Colonial" was a misnomer; the status of Colony was outgrown, the Dominions were self-governing in fact whatever the form. Consequently there was formed a new body under the following resolution:

> That it will be to the advantage of the Empire if a conference, to be called the Imperial Conference, is held every four years, at which questions of common interest may be discussed and considered as between His Majesty's Government and His Governments of the Self-Governing Dominions beyond the seas.
>
> The Prime Minister of the United Kingdom will be ex-officio President, and the Prime Minister of the self-governing Dominions will be ex-officio members of the Conference. The Secretary of State for the Colonies will be ex-officio member of the Conference and will take the chair in the absence of the President. He will arrange

(5) There had been sporadic and unconnected movements in opposition to the Government before this time, e. g., those of Mr. Justice Thorpe and others in 1806.

(6) To finish this story. Germany placed a surtax on Canadian goods by way of revenge, Canada promptly retaliated and Germany came down.

for such Imperial Conference after communication with the Prime Ministers of the respective Dominions.

Then came the War, and Germany made that assault upon innocent Belgium so long preparing and at last thought certain of success. Canada did not delay a minute—the Atlantic cable carried the message, "The last man and the last dollar."

Canada raised her own forces, equipped them with Canadian guns, Canadian munitions, cared for them and pays the pensions of survivor and widow and child of the honored dead. Sixty thousand Canadian dead and three times as many wounded prove how Canada acquitted herself. England could not call upon us for a soldier, a ship, an ounce of supplies, a cent of money; nor did we fight for England. We poured out our money like water, our men died in tens of thousands for a struggle we call our own, because we believed and believe it to be for humanity at large and for our own chosen form of civilization. And Britain knows. Since the War began, no responsible British statesman has ever spoken of Canada as a Colony.

Canadians were dying by thousands and it was felt that Canada should have some say in the conduct of the War. And this is what was done:[7]

> In 1917 the Prime Minister of Great Britain called together the ministers of the self-governing Dominions for consultation on vital matters of policy relating to the prosecution of the war. They met as equals as Prime Ministers of the nations of the Empire, to discuss matters of common concern to the whole Empire. Great Britain recognized that, with the growth of power and influence of the Dominions, the time had come when the Government of Great Britain should frankly recognize that the Dominions had ceased to be in any sense states dependent upon the Mother Country, and had become sister Nations, standing on an equality with the Mother Country.

Lest it be thought that this is a Canadian overstrong statement of the situation, let us see what the Imperial War Cabinet itself says in the Official Report for 1918:

> The common effort and sacrifice in the war have inevitably led to the recognition of an equality of status between the responsible governments of the Empire. This equality has long been acknowledged in principle, and found its adequate expression in 1917 in the creation, or rather, natural coming into being, of an Imperial War Cabinet as an instrument for evolving a common Imperial policy in the conduct of the war. The nature of the constitutional development involved in the establishment as a permanent institution of the Imperial Cabinet system was clearly explained by Sir Robert Borden in a speech to the Empire Parliamentary Association on the 21st of June, 1918.

What the Prime Minister, Sir Robert Borden, said at the meeting of the Imperial Council is as follows:

> A very great step in the constitutional development of the Empire was taken last year by the Prime Minister when he summoned the Prime Ministers of the Overseas Dominions to the Imperial War Cabinet. We meet there on terms of perfect equality. We meet there as Prime Ministers of self-governing nations. We met there under the leadership and the presidency of the Prime Minister of the United Kingdom. After all, my Lord Chancellor and gentlemen, the British Empire, as it is at present constituted, is a very modern organization. It is perfectly true that it is built up on the development of centuries, but as it is constituted today, both in territory and in organization, it is a relatively modern affair. Why, it is only 75 years since Responsible Government was granted to Canada. It is only little more than fifty years since the first experiment in Federal Government,—in a Federal Constitution,—was undertaken in this Empire. And from that we went on, in 1871, to representation in negotiating our commercial treaties; in 1878 to complete fiscal autonomy, and after that to complete fiscal control and the negotiations of our own treaties. But we have always lacked the full status of nationhood because you exercised here [i. e., in England] a so-called trusteeship under which you undertook to deal with foreign relations on our behalf, and sometimes without consulting us very much. Well, that day has gone by. We come here, as we came last year, to deal with all these matters, upon terms of perfect equality with the Prime Minister of the United Kingdom and his colleagues.
>
> Every Prime Minister who sits round that board is responsible to his own Parliament and to his own people; the conclusions of the War Cabinet can only be carried out by the Parliaments of the different nations of our Imperial Commonwealth. Thus each dominion, each nation, retains its perfect autonomy. I venture to believe, and I thus expressed myself last year, that in this may be found the genesis of a development in the constitutional relation of the Empire which will form the basis of its unity in the years to come.

I cannot do better than quote what General Smuts, the head of another of the British nations, said in his Parliament:

> I remember when the report of our National Convention was made I made the statement that the most important thing about that document was the list of signatures at the end of it. And it is very much the same with regard to the Peace Treaty. For the first time in history the British Dominions signed a great international instrument, not only along with the other ministers of the king, but with the other ministers of the great powers of the world; and although the tremendous importance of this great act has not been fully recognized, there is no doubt that the treaty signed, as it has been with parties to it, not only representative of the King in the British Isles, but in the Dominions, forms one of the most important landmarks in the history of the British Empire. The British Dominions did not fight for status. They went to war from a sense of duty, from their common interest with the rest of the world, vindicating the great principle of free human government. Not only has victory been achieved for the objects for which they fought, but what for the British Dominions is equally precious—they have achieved international recognition of their status among the nations of the world. In a large sense this world is one of small nations and certainly none of those had had larger results accruing to them from this war than the young nations of the British Empire. They have deserved this through the magnitude of their efforts. It has been proved and has never been challenged that two of the British Dominions—Canada and Australia—made a greater war effort than any other powers below the rank of first-class powers. Their achievements have been outstanding ones. Australia alone lost more than the U. S. A. They [i. e., Canada and Australia] have, of course, lost heavily; they are handicapped with enormous debt; but they have at any rate emerged with victory, honor and a new standing in the world, in that they are internationally recognized today. No wonder, after what has been done, their great performance all through the war, and especially towards the end of it, that the other powers and nations of the world are only too willing to welcome and recognize them within the great new family. It took some time for the position to be realized at Paris, because so many of the powers were under the same impression which, according to the debate in the House that afternoon, appeared to exist in South Africa, viz., that everything seemed to be under the tutelage of the British Parliament and Government. They could not realize the new situation arising, and that the British Empire, instead of being one central government, consisted of a large league of free states, free, equal and working together for the great ideals of human government. It was difficult to make people realize this, but afterwards they fully applauded and their approval was given as embodied in this international document.

Let me again quote Viscount Milner:

> No international conference is really complete in these days unless the British Dominions are represented. It is absurd to suppose . . . that the presence of Canada and Australia in international discussions is not at least of equal importance with that of Chile or the Argentine . . . Bolivia or Paraguay"—and I add "or Nicaragua or Cuba, Panama or Hayti."

All these changes have taken place with a minimum of change in the letter; old forms continue, old

(7) I quote the words of the President of the Council speaking in his place in the House of Commons at Ottawa.

names persist, old ceremonies survive—but it is the glory of our unwritten constitution that we build more stately mansions on the old foundations, we graft new and fruitful shoots on the old stock, we fill with a new and beautiful life the old ceremonies and forms.

The new British Empire is the triumph of the unwritten constitution, which none who know not the virtues of an unwritten constitution can understand. No people but the English-speaking Anglo-Saxon-Celt could elaborate or even conceive of such a scheme.

Legislation there must be to make the form in some degree accord with the fact. In a few months or years, there will be a Convention or Conference of statesmen from all parts of the far-flung British world, whose task it will be to frame a Constitution that all may read, with word married to fact. We are, and we intend to continue members of a British League of Nations inside the Empire in a separate, distinct and intimate relationship of our own with the United Kingdom and the other Dominions.

That will not be permitted to interfere with our absolute right to sit as a separate member in international conferences by the side of the United Kingdom, backing her when we so decide and opposing her (as we have done already more than once) when we judge it proper so to do.[8]

There are those who see or affect to see in this a deep-laid scheme to give Britain an advantage over other nations. There is no scheme, no plot; it was not the United Kingdom who desired the presence of the Dominions at the Treaty Council table and in the League of Nations—the Dominions themselves demanded it as a right and as in accord with the fact. I more than doubt that the United Kingdom will receive any advantage from their presence at either—so far the evidence is the other way. Ask Japan how the presence of Mr. Hughes of Australia affected her aspirations after the United States had shown herself complaisant. Ask some of the European countries what they think of Canada's stand concerning natural resources; nay, ask the British statesmen themselves, what they think of Canada's demand for the excision of Article X, which we protested against in the beginning, protested against again at Geneva, and which we will continue to protest against until it disappears.

However that may be, in the absence of the British Dominions there can be no really international conference, and we will not, to please any nation, change our attitude. We will not go back to the colonial status, and to give up our flag is too high a price to pay—we will not pay it. If any other nation stay out of the League, that is its business, not ours; we do not criticize or complain; we stand four square, we are in and we stay in.

It has been suggested that we should have an Ambassador at Washington. The official statement reads thus:

> As a result of recent discussions, an arrangement has been concluded between the British and Canadian Governments to provide more complete representation of Canadian interests at Washington than has hitherto existed. Accordingly it has been agreed that His Majesty, on the advice of his Canadian Ministers, shall appoint a Minister Plenipotentiary, who will have charge of Canadian affairs and will at all times be the ordinary channel of communication with the United States Government in matters of purely Canadian concern, acting upon instructions from and reporting direct to the Canadian Government.
>
> In the absence of the Ambassador, the Canadian Minister will take charge of the whole Embassy and of the representation of Imperial as well as Canadian interests. He will be accredited by His Majesty to the President with necessary powers for the purpose. This new arrangement will not denote any departure either on the part of the British Government or the Canadian Government from the principle of the diplomatic unity of the British Empire.
>
> The need for this important step has been fully realized by both Governments for some time. For a good many years there has been direct communication between Ottawa and Washington, but the constantly increasing importance of Canadian interests in the United States has made it apparent that in addition Canada should be represented there in some distinctive manner, for this would doubtless tend to expedite negotiations and, naturally, first-hand acquaintance with Canadian conditions would promote good understanding.
>
> In view of the peculiarly close relations that have existed between the people of Canada and those of the United States, it is confidently expected as well that this new step will have the desirable result of maintaining and strengthening the friendly relations and co-operation between the British Empire and the United States.

I have read many articles in the American Press concerning this proposed movement; and I have not yet seen one adverse comment. Even those papers which approved the Senate's reservation that Canada should not be admitted on a par with Hayti in a League of Nations, approved the project whereby Canada asserted her nationhood. This project hangs fire for the present for various reasons, but it will in any case be a Canadian question for Canadians to decide as they think wise. Moreover it is but putting in regular form what has (so far as Canada is concerned) long been the practice.

We made an arrangement with the United States in 1903 and 1905 for a Joint Board of Commissioners to deal with International waters; in 1909 we made a Treaty for the present International Joint Commission. After the abrogation of the Reciprocity Treaty in 1866, we many times sent envoys from Canada to Washington to obtain if possible a new Reciprocity Treaty, and when the time seemed auspicious in 1911, we sent representatives—Ambassadors in all but name—to negotiate a new Treaty. We in fact deal and have for years dealt directly with the American authorities and the new scheme is but a change in form.

Of the future, no man may speak with absolute certainty—but unless all signs fail, Canada will remain within the Empire but governing her own affairs and her own destiny. It seems probable that there will be an immense influx into Canada from the British Isles, but as in the past those who were discontented and even disloyal in the lands across the sea have by association with older Canadians become the most enthusiastically British and loyal to British connection, the same happy result is to be expected in the future.[9]

(8) The expression "British Dominions" has taken on a new and permanent connotation. It no longer means territory under the dominion of the British Isles; it means Dominions possessed by the British people within their borders; no adjunct to any other people, British or foreign.

(9) Since the above was written an official statement by the present Colonial Secretary, the Rt. Hon. Winston Spencer Churchill has come to hand: "Addressing an English-speaking union farewell to Lord Reading, the new Viceroy of India, Mr. Churchill said that so far as the Dominions and the British Empire were concerned the new principle developing was the common consultation among members of the British Empire regarding difficulties of any one of them. No decision concerning the status of one nation of the Empire could be taken in a final way without consultation between the whole body of the Empire. The Dominions would share with the Motherland in the responsibility of dealing with great dominant questions and decisions which affected the common fortunes of the whole body.

"The principle, Mr. Churchill said, might be found to have its usefulness in relation to parts of the Empire as far apart and widely different as Ireland and Egypt. 'We all know how great the difficulties are and the need for unity to solve our problem. I am hopeful and confident that in a few years our present difficulties in Ireland and Egypt will be greatly diminished, and that the nations which are now a reproach and a stumbling block to the supreme cause the English-speaking union has at heart may be found managing their own affairs, unfolding their own destinies peacefully and prosperously within the elastic circle of the British Empire.'"

ORIGIN AND USES OF BAR ASSOCIATIONS

Review of Much Interesting History Relating to Organizations of the Legal Profession, Beginning with Colonial Times and Extending to the Present*

By Marvelle C. Webber
President Vermont Bar Association

THE development of bar associations in their present form and for the purposes to which they are dedicated is of comparatively recent origin, beginning with the organization of the Association of the Bar of the City of New York in 1869, followed by the organization of the New York State Bar Association a few years later, of the American Bar Association in 1878, and of the Vermont Bar Association in the same year.

There had been organizations of the bar before this time; but the first State bar association ever organized was that of the State of New York, modeled on the Association of the Bar of the City of New York. Organizations of the bar in this country previous to that time were county or city organizations, and formed more particularly for the purpose of professional advantage rather than with the broader view of public good, excepting so far as the elevation of the standard of the profession, which has always been an object of associations of lawyers, would necessarily tend to the public advantage. The earlier associations of lawyers seem to have been brought about principally for the purpose of maintaining a high standard of legal knowledge on the part of applicants for admission to the bar, and sometimes for the protection of their own rights.

In the early colonial days lawyers were not regarded very highly, and in some colonies attempts were made to drive them from the practice of their profession; and I find that as late as 1846 the lawyers of Kentucky organized to prevent an amendment to the Constitution to overthrow the legal profession as a privileged class, hostile to our Institutions. The lawyers were in a great minority in the Convention, and as a result of agitation against the legal profession a majority of the convention were in favor of a constitutional amendment to drive the lawyers out of practice. The organization formed by the lawyers succeeded in defeating the proposed amendment.

The earliest association of lawyers that I have found reference to in this country was an association that existed in New York from 1744 to 1770. Patriotic impulses led to its formation. They organized at that time for the purpose of resistance to the encroachments of the British Crown in the exercise of the King's prerogative. Mr. Theron G. Strong in his book, "Landmarks of a Lawyer's Lifetime," describes their activities as follows:

> In 1763, the then Governor, Cadwalader Golden, undertook to enforce the rule that the Governor and King's Council could review upon appeal the facts found by a jury, and nullify the verdict. The Associated Lawyers rose in opposition, and when the question was to be finally tested, he could find no lawyer to undertake to argue it in his behalf. He assailed the Association as a dangerous influence, tending to enlarge the powers of popular government by depreciating the powers of the crown, and suggested measures intended to end the domination of lawyers. Surely all honour is due to the sturdy patriots of the bar who not only jeopardized the pursuit of their profession but also their lives in resisting the tyranny of the King and his officers (p. 157).

In 1835 Chancellor Kent delivered an address to the Bar of the City of New York, called together for the purpose of organizing a legal alliance, in which he referred to prejudices against the profession, and its powerful influence for good in our country in the following eloquent language:

> When we consider the powerful influence of lawyers in our country, when we consider that to them is committed the great work of sustaining, if I may use the expression, the machinery of our jurisprudence; when we consider the mighty responsibility resting upon them; when we recall the prejudices and opposition, I had almost said hatred, of a powerful class of people, we see at once the necessity of combining our influence, our strength, our learning, our eloquence in a combination or association that shall resist all opposition and strengthen their work in sustaining the great fabric of our jurisprudence, by bringing to its aid the powers and influence resulting from association. (59 Albany L. J. 374.)

Referring to the potent influence of the legal profession in America, an early English writer has said:

> The bar has usually been very powerful in America, being the only class of educated men who are at once men of affairs and skilled speakers, and also because there has been no nobility or territorial aristocracy to overshadow it. Politics have been and are largely in its hands, and must remain so as long as political questions continue to be involved with the interpretation of constitutions and the laws. The work of legislation, the administration of jurisprudence, and, as has already been said, of expounding the Constitution, has been largely, and we may say wholly, committed to the bar of the nation. For the first fifty or sixty years of the republic the leading statesmen were lawyers, and the lawyers as a whole molded and led the public opinion of the country. Now to the better class of lawyers law was a sacred science, and the highest court that dispenses it a sort of Mecca, towards which the faces of the faithful turned. (59 Albany L. J. 373.)

Considering the powerful influence of the legal profession in the framing of the constitutions and the laws of the United States and the several States and in the administration of justice, it is remarkable that this influence should have been exercised without organization of the bar. It testifies to the ability and integrity of the profession and the respect in which it was held by the public at large. However, organization in professions, in trades, and in business, in the modern form, is of comparatively recent origin; but it seems that the legal profession lingered somewhat behind the other professions and the trades in realizing the advantages of organization.

In England the bar organized in early times and when the trade guilds were exerting a powerful influence. The Inns of Court are of very ancient origin, first formed to regulate admission to the bar, but later developed into a potent influence toward the elevation of the courts and the bar, the preservation of their rights, and the administration of justice. They have proved to be a wholesome and commanding force in maintaining the rights, upholding the dignity and elevating the tone of courts as well as lawyers generally.

*Extracts from Annual Address delivered by President Webber to the meeting of the Vermont Bar Association in 1920.

There are four Inns of Court, the Inner Temple, the Middle Temple, Lincoln's Inn and Gray's Inn. These are not only the names of the societies but also of the buildings they occupy. The Middle Temple is so called because the building was formerly the dwelling of the Knights-Templar; Lincoln's Inn and Gray's Inn, from the fact that they anciently belonged to the Earls of Lincoln and Gray. These societies were invested with the exclusive right to Call to the English Bar. The members of the Societies are benchers, barristers and students, the benchers being of the highest rank. In each Inn building there is a hall, chapel, library, etc., besides sets of chambers occupied by barristers and solicitors. Previously to being called to the bar, it is necessary to be admitted a member of one of the Inns of Court and to go through a certain course of legal study and "keeping terms." The educational year is divided into three terms. Attendance is not compulsory on students either at lectures or private classes; nor is it essential to study the practice of law in the chambers of a barrister, though this is recommended. The significance of our annual banquets may perhaps be traced to the fact that a term of court is kept by the student being present at six dinners during the term in the hall of the society to which he belongs, and that on certain grand days the Judges, Masters in Chancery, and many of the leading lawyers of England dine in the great hall of the Inner Temple, together with a large assemblage of the students. The classes conducted in the Inns of Court take the place in England of our law schools in this country, in preparing students for the Bar. The societies are governed by the benchers of the Inn who are elected from the barristers according to seniority.

Speaking on the occasion of the organization of the Ohio State Bar Association in 1880, which was the fourth State Bar to organize, Justice Stanley Matthews, after referring to the fact that there had previous to that time existed local organizations of the bar in Ohio in several important centers of activity exhibiting vitality enough for their own preservation and giving good ground to extend such organizations to the Bar of the whole State, remarked that such organizations are but a revival of an inherited tendency. He then went on to say:

> The bar of England—that most illustrious body of well trained men who have wrought so usefully and conspicuously in the gradual construction of the best civilization of the age, whose traditions we follow, whose language we speak, whose system of jurisprudence we administer, whose precedents are our authorities—is today the only survivor of the mediæval guilds that retains, untouched by the chances and changes of time, its ancient and original privileges and prerogatives; chiefly the right of admitting and excluding from admission to its own membership. No man can be admitted to practice in England except by the Bar of England. Its home and schools are still, as for hundreds of years they have been, in the beautiful temples by the Thames, the ancient seats of Christian Knights, whose spirit of chivalry and charity and justice to the poor and weak still inspires the locality, and survives in the tournaments and jousts and peaceful strifes and contests of high minded lawyers, honorably maintaining their opposing sides, but nevertheless fighting in the same great cause of civil justice, under a common banner *suum cuique tribuere*.

The Association of the Bar of the City of New York is the prototype of modern bar associations and a distinct advance in their development. In the troublous times when New York City was in the grip of the notorious Tweed ring and corrupt politics had extended its nefarious influence to the prostitution of bench and bar, the Association of the Bar of the City of New York was organized. The call issued in December, 1869, stated that the signers believed that the organized action and influence of the legal profession, properly asserted, would lead to the creation of more intimate relations between its members and would at the same time sustain the profession in its proper position in the community and thereby enable it in many ways to promote the interests of the public. The remarkable feature then introduced as a purpose of bar organizations was *the promotion of the interests of the public*.

A Committee was appointed to call a meeting for the organization of the proposed association which was completed February, 1870. The objects of the association as expressed in the articles of incorporation were "for the purpose of maintaining the honour and dignity of the profession of the law, of cultivating social relations among its members and of increasing its usefulness in promoting the due administration of justice." The objects as here stated have become the model of all our State Bar Associations and of the American Bar Association with some slight changes. While the objects of the association make no reference to schemes of reform, no doubt the influence then being exerted by the Tweed ring to corrupt bench and bar aroused the lawyers to the necessity of combined effort to combat this influence. Events soon occurred that brought the association into active co-operation with the committee of citizens known as the "Committee of Seventy" to wrest the control of the city from the band of plunderers and thieves then occupying the positions of power in the city government, and to free the administration of justice from their corrupt influence. This combination brought about the complete overthrow of the Tweed régime and the emancipation of the judiciary.

Speaking of these services performed by the Bar Association, Mr. Strong says:

> If the Association of the Bar had never in its career performed any other service of a public character, its existence would have been amply justified by the tremendous service which it rendered to the administration of justice during these stirring times. (P. 168.) . . . The Association of the Bar had a tremendous following. In almost every county of our State, and in many of the counties of the various States of the Union, will be found associations of the bar upon substantially the same basis as our own. In its hall was promulgated the idea of forming the New York State Bar Association, which has had a flourishing existence, and this in turn was followed by the American Bar Association, which embraces all the States of the Union. (P. 175.)

A few years after the organization of the Association of the Bar of the City of New York, realizing the great advantages of organization and the powerful influence exerted thereby, the bar of the State of New York organized a State Bar Association upon the same model. The objects of the association were stated as follows:

> This Association is formed to cultivate the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, to elevate the standard of integrity, honor and courtesy among the members of the legal profession, and to cherish a spirit of brotherhood among them.

We note particularly here a new object, viz; to promote reform in the law. Soon after the organization of the New York State Bar Association the American Bar Association was organized, on August 21, 1878. Its object is:

> To advance the science of jurisprudence, promote the administration of justice and uniformity of legislation

throughout the nation, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar.

The objects are substantially the same as those of the New York State Bar Association excepting that there is added another object, viz: to promote uniformity of legislation throughout the nation.

This has been a very important work of the American Bar Association and much has been accomplished to make uniform laws relating more particularly to commercial law and domestic relations. It is a defect in our form of Government under present conditions that we do not have uniformity of law. It is fortunate that as our State governments were organized and developed the makers of the Constitutions and of the laws were largely of Anglo Saxon descent, and a considerable proportion of them lawyers trained in the English common law, else the legislation of our States would have been so diverse as to have hindered and prevented our development as a nation. All the States in the Union, as well as Alaska, the District of Columbia, the Philippine Islands and Porto Rico provide for the appointment of Commissioners on Uniform State Laws to attend a conference of Commissioners in affiliation with the American Bar Association for the purpose of working out a uniformity of legislation. This has been the result of the work of the American Bar Association in carrying out its object to promote uniformity of legislation throughout the nation.

The second State to form a State Bar Association was Illinois, organized in 1877. Vermont was the third State. Our State Bar Association was organized in November, 1878.

No doubt the enthusiasm created by the organization of the American Bar Association prompted the calling of a meeting to the bar to form a State Bar Organization in Vermont. The object of the Association, as stated in the article of the Constitution, is to cultivate the science of jurisprudence, promote reform in the law, to facilitate the administration of justice, to elevate the standard of the legal profession, to cherish a fraternal spirit among its members and to perpetuate their memory. It will be noted that the object stated is very similar to that of the American Bar Association but almost identical with the object stated in the Constitution of the New York State Bar Association with the exception that an additional object appears in our Constitution, viz; to perpetuate the memory of its members.

The Ohio State Bar Association, organized in 1880, the fourth State bar organization, expresses as its objects substantially the same as our own, adding the object "to encourage thorough liberal legal education," and not including the object to perpetuate the memory of its members. This seems to be a provision of our Constitution not general among the bar associations. Up to 1880 only four State bar organizations had been formed, but by 1888 they had increased to twenty-eight, showing a very rapid development of State organizations in the ten years from 1880 to 1890. In a very interesting address before the Ohio State Bar Association in 1888 President E. P. Green emphasized the value to the public of such organizations. Permit me to quote a few paragraphs from his address to demonstrate the public nature of our organizations:

> The fact that in 1880, when we met in Cleveland, and organized this Association, there were in all the States of the Union but four State Bar Associations, and that there are now twenty-eight, we accept as proof that the interests of the country demanded such Associations, and that our duty to the state requires that we shall vigorously maintain this Association. The best interests of the country, the good of the people, demand it. While it is true that much good will come to the profession—if not to the profession at large, certainly to all such as attend its meetings and labor to bring about the reforms proposed—yet, if I did not believe that by our work great good had already been done, and much more would be accomplished for the people, my interest in and anxiety for its success would be very much less than it now is. . . . It is a fact, and one that we must meet, that there is a loose, undefined notion or opinion afloat . . . that this Association was formed or is kept up for the sole purpose of, in some way or manner, advancing the interests of the profession at the expense of the people (p. 117). . . . Let us examine and see what this Association declared to be its object and purpose; then, what it has done, and attempted to do, and determine whether its declarations and its acts have been in the interests of its members as lawyers simply, or whether they have been in the interest of the state, of all the people. (Vol. IX, Ohio State Bar Association Reports, Appendix, p. 119.)

He then takes up each distinct object, viz; (1) to advance the science of jurisprudence; (2) to promote reform in the law; (3) to facilitate the administration of justice; (4) to uphold honor, integrity and courtesy in the legal profession; (5) to encourage thorough liberal legal education, and conclusively shows that all these objects are of great interest to the public at large, and for the public good; and as the objects of the Ohio State Bar Association are substantially those of other State Bar Associations, his argument makes proof of his contentions for all State Bar Associations. The mere reading of the purposes of our State Bar Association is a demonstration that we are laboring for the good of the public, not for selfish ends.

We are often charged with being responsible for the law's delay and yet for fifty years the bar organizations have made it one of their principal objects to promote reform in the law and to facilitate the administration of justice. In that time there have been great reforms in the law and in the administration of justice, and the lawyers of this country working through their bar association organizations are entitled to more credit in this respect than any other class of citizens.

As an example of what bar associations have done in accomplishment of this object I will call to your attention some of the reforms accomplished in our own State. The first reform proposed was the drafting of uniform rules of practice and recommending their adoption by the several county courts. Also at the first annual meeting a resolution was passed looking to legislation providing for general terms of the Supreme Court to be held at Montpelier. In 1881 the bar association appointed a committee to prepare a revision of the rules regulating practice in Chancery. Through the efforts of the Bar these reforms were soon effected. The importance of establishing uniform rules of court is far greater than the younger lawyers of this Association can appreciate, but the older members who were in practice before the adoption of uniform rules can testify to the great advantage of this much needed reform.

Another very important reform brought about through the efforts of our Bar Association in the cultivation of the science of jurisprudence and the encouragement of a thorough liberal legal education was the establishment of rules for the admission of attorneys, making them uniform throughout the State,

fixing a definite and required course of study and a more strict examination than existed formerly.

The re-writing of the Constitution of the State of Vermont came about at the instance of the Bar Association. Before the re-writing of the Constitution it was almost imposible to read it intelligently and with comprehension because of the very numerous amendments.

It was the Bar Association that emphasized the need of a change in our court system and was largely instrumental in bringing about the establishment of our present dual system of courts,—a reform that has more than justified itself by its results in facilitating the administration of justice.

The present practice act became a law largely through the efforts of the Bar Association, and has on the whole proved to be a decided improvement in practice and procedure, facilitating the administration of justice.

But the Bar Association has not been content merely with reforms in the law, but from the beginning has been earnest in its endeavor to elevate the standard of the legal profession.

Emphasizing this purpose of our Association, President Dale in his annual address in 1886 closed with the following eloquent exhortation:

> Let us go, then, from this interesting occasion to our work, never again by a single expression to belittle it, but to encourage accuracy and skill, and foster the highest art and method consistent with a just and free administration of the laws regulating our clients' interests, doing good work, square work, in that honor and fidelity demanded by our high occupation. Then, when it is recorded, there will come to us as much true esteem as we shall merit, as well as a just portion of that kind of fame for which fools never hunger or thirst. (Vol. 2, Vt. Bar Association Reports(p. 29.)

It is interesting to note a very recent form of proposed development of bar associations. At the last annual meeting of the American Bar Association, in 1920, the Committee on State Bar Organizations reported in favor of the incorporation of the various State Bar Associations to include every member of the bar. The reasons given are briefly (1) that the legal profession does not enjoy that place in the confidence and esteem of the public to which it is entitled; (2) that no greater improvement in this situation can be had without bringing the entire bar into an organization in which all lawyers shall have a part, and to which all shall be responsible for their professional conduct; (3) that, subject to the final authority of the State Supreme Court, the bar itself should have broad powers of discipline and control over the matter of admitting applicants to the bar.

The recommendation of the committee is not a legislative determination transforming the present voluntary Bar Associations into corporations created by special statute, but a legislative act providing for the organization and functioning of the State Supreme Court Bars. If any one desires further information in regard to this movement he will find an article on "Bar Organization Act," Volume 4, Journal of American Judicature Society, Page 111, and the proposed Act, page 112. The report of the Committee on State Bar Organization of the American Bar Association will be published in the annual report of 1920, advanced copies of which have probably already been received by many of the members of that Association.

The value of organization of State Bar Associations should recommend to the members the additional advantage of becoming members of the American Bar Association. One can be entirely loyal and devoted to his state organization and at the same time be a loyal and devoted member of the national organization. It gives an opportunity for effort in the same line and for the same elevated purposes, but in a broader field. It means more opportunity for public good and individual improvement.

A very important feature of the work of the American Bar Association is the annual meeting of delegates from the State Bar Associations, meeting in conference on the occasion of the annual meetings of the American Bar Association. These conferences are in affiliation with the National Association and came about through the initiative of the National Association and were devised as a means of contact between the State Bar Associations, as Associations, and the American Bar Association for the purpose of unifying their work and making more effective their organization.

Meeting of Attorneys General

The National Association of Attorneys General is planning to hold a meeting on August 29 and 30 at the Hotel Sinton, Cincinnati, Ohio, immediately preceding the meeting of the American Bar Association. It has been the custom for some years for the Attorneys General to meet in connection with the American Bar Association and the addresses and discussions at such gatherings have proved uniformly interesting and profitable.

Since the meeting last year Attorney General J. Q. Smith of Alabama, who was elected President in 1920, has resigned in order to accept an appointment on the Bench of his state. Attorney General Byron S. Payne, of South Dakota, Vice-President of the Association, will therefore act in his place at the coming meeting. The other officers of the Association are: Richard T. Hopkins, Secretary and Treasurer; Byron S. Payne, Clifford L. Hilton of Minnesota, Samuel L. Wolf of South Carolina and Richard T. Hopkins, Executive Committee.

Legal Aid to Aviation

So important is aviation in the minds of the people of Dayton, Ohio, that they purpose, according to the Ohio Law Bulletin and Reporter (May 30) to impress upon those visiting that city in connection with the coming meeting of the American Bar Association "the fact that uniform national and state legislation is necessary before aviation can occupy its full sphere as a transportation medium. Two phases of aviation, for which the Association will be asked to secure uniform legislation, are uniformity in pilotship requirements and eligibility and in the type of machines which may be used for flying purposes. With the present lack of legislation there is the danger of a great variety and diversity of aviation ordinances that will be promoted in various parts of the country which would make marked advancement in commercial aviation practically impossible."

CURRENT LEGAL LITERATURE

THE further *extension of the police power* found in the judicial sanction of the New York Emergency Rent Laws is the subject of a discussion by George W. Wickersham of New York City in the May issue of the University of Pennsylvania Law Review. The look into the future with which the article ends is reproduced:

> The police power has been fitly called "the law of necessity." It is the product of judicial alchemy, which in it has found a solution for the great embarrassment which would have resulted by conceding to constitutional restrictions on governmental power the full force of the language of those who sought to express actual limitations, and to preserve individual rights in fact as well as in theory. But, in so doing, the rights of liberty and property have been reduced to slender and unsubstantial proportions. Eternal vigilance is now, more than ever, the price of liberty. That protection which, in the earlier period of our national history, was furnished by the courts, henceforth must be looked for in the legislature. Never before in our history has it been more vital to the individual citizen that legislative bodies, State and National, should be representative of the best intellect and character of our people. With a sense of a responsibility of which the legislature no longer is relieved by the courts, legislation should be more cautiously framed, more wisely conceived, and more justly enacted than ever before. But the citizen must henceforth be the guardian of his own liberty, for the ancient protection embodied in the formulæ of individual rights, interpreted and enforced by judicial tribunals, no longer can be depended upon as barriers against collective wishes or group desires.

C. Brewster Rhoads of Philadelphia discusses in the same journal *"The Police Power* as a Limitation upon the *Contractual Right of Public Service Corporations."*

Emanuel R. Parnass of Chicago sets out in the Illinois Law Review (April) the cases in which it is still possible to have *imprisonment for civil obligations* in Illinois and elsewhere and states fully the present law on this subject.

There is printed in the May issue of the Ohio Law Bulletin and Reporter an address by Frank H. Shaffer before the Lawyers' Club of Cincinnati on the organization of companies under the *Non-par Value Stock* Act of Ohio. Mr. Shaffer approves this scheme of corporate organization and points out the details of the Ohio enactment. One reading all of the current comment on this innovation in such a basic matter and seeing the conflict of informed opinion on the wisdom of it cannot but wonder at the readiness with which legislation of this sort is passed.

An illuminating discussion of *the presumption of death from absence* is that by Minor Bronaugh in the May issue of Law Notes.

A thoughtful consideration of *the new Civil Practice Act and Rules of New York* is the address by Mr. Justice Alfred R. Page of the Appellate Division, First Department, which was delivered before the Association of the Bar of the City of New York and which appears in the April issue of the Association's Bulletin. One's study of the new procedure might well begin with a careful reading of this address since it sets out most adequately the underlying purposes of the innovations.

With the May issue, the Ohio Law Bulletin and the Ohio Law Reporter are combined in one magazine to be known as the *Ohio Law Bulletin and Reporter.* William J. Tossell, editor of the Bulletin, and Vinton R. Shepard, editor of the Reporter, will continue as editors of the new publication.

In the April issue of the Virginia Law Review, Montgomery B. Angell states the problem of his discussion thus:

> The *usury laws* of many States fix the maximum rates of interest which banks located therein may receive. The question has been raised as to whether such State laws control and limit the rates of interest and discount which the several Federal reserve banks may charge, or whether these banks are free to fix their own rates without regard to the State legislation.

The leading articles in the May number of the Illinois Law Review are: "Admiralty and Maritime Jurisdiction of the Courts of Great Britain, France, and the United States" by J. Whitla Stinson of New York City; "Gambling in Illinois" by George D. Smith of Chicago.

A review of existing *legislation regulating conduct on Sunday appears* in the May issue of the Virginia Law Register.

One of the most careful discussions of the *Court of Industrial Relations in Kansas* which has appeared in current legal literature is that by H. W. Humble of the University of Kansas Law School. Whatever their hopes may be, many will doubt the author's optimism in seeing in this experiment, "a solution of the problem which has vexed society, if not from the time when Adam began to delve for himself, at least from the day when one man worked for another." This article appears in the May number of the Michigan Law Review.

Harold R. Smith of the University of Michigan Law School discusses in the same journal *how far a director* of a corporation *is privileged to purchase shares from a share holder.*

John M. Matthews of the University of Illinois concludes a discussion entitled, *"The States and Foreign Relations"* in the May issue of the Michigan Law Review as follows:

> Instances of treaty provisions which, instead of assuming responsibility directly, undertake on the part of the United States Government to ask the States for appropriate action, have been rare, and . . . if the United States were required, as a rule, to resort to such procedure, the ultimate result would be that few nations would be willing to grant us privileges in exchange for a promise on the part of our Government merely to recommend to the States the granting of a similar privilege. The courts have construed the treaty-making power as extending to all matters which are appropriate subjects of international negotiations, and, as the Supreme Court declared in the Arjona case, "the National Government is . . . responsible to foreign nations for all violations by the United States of their international obligations." This being the case, it follows that the National Government must have power commensurate with its responsibility. Ultimately, by Congressional action, or by constitutional amendment if necessary, means of control must be provided for the preservation of treaty rights by the National Government. At the same time, care should be taken, so far as possible, that no treaty engagements should be entered into the carrying out of which will arouse the deep-seated hostility of the great majority of the people in particular States.

There appears in the May issue of the Minnesota Law Review the first installment of a study of *the effect of war upon international law* by Professor Quincy Wright of the University of Minnesota. He states it as his purpose "to make a preliminary effort towards stating the effect of war on the international law of peace, war and

neutrality, though with full realization that the time is not yet ripe for an adequate statement."

Mr. Justice Nelson Phillips of the Supreme Court of Texas is the author of one of the leading articles in the May issue of the Virginia Law Review. The subject is *"The Integrity of American Life and American Law."* He concludes with a note which tunes true to the thought dominant in our country at its founding:

> The noblest part of our Constitution is our Bill of Rights. Other parts deal with the functions and powers of government. They deal with the common man. They are the noblest part because they express the finest of human virtues—the virtue of self-control, and because they exhibit the restraint set by the whole people upon themselves in the simple interest of the rights of the single individual, the lone man, who in their name may defy the multitude, and before whom, thus armed with the majesty of the law, all the minions of might and power must bow in respectful deference.
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> By and through the inbreeding qualities of this great elemental idea of the Common Law, the qualities of self-reliance, independence, initiative, resolution, courage and industry, the Anglo-Saxon has wrought his mighty train of achievement and attained a destiny of superiority and usefulness the Greek or Roman could never know. Out of it have come the noble principles of freedom which have bettered the world and made it a happier place in which to live. It is not irreverent to call it one of the providences of God, stretching dimly into a remote time, working through the mysterious ages; all for the elevation and progress of his children and to sustain them with its brooding care as they travel onward into the future.
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> If we ever abandon this fundamental idea of the Common Law, the law and justice of Anglo-Saxon history and development will have lost their foundation and will have taken on a new and different character. For a millennial period a new and different character might be better suited. But while the passions, the impulses, the frailties of mankind remain as they have been since creation's dawn, I cannot but believe that that system of law and justice which is peculiarly the outgrowth and reflection of the experience of a race through the long and tragic years of its life, will, in its full integrity, best breathe the spirit of that race, and, developing as it develops, will continue to safeguard and serve it best.
>
> Edmund Burke defined society as a contract between the great dead, the living, and the unborn.
>
> Let us, the living, always keep that part of the compact which expresses our obligation to the free principles of the Common Law. If we do, however much we may fail in other things, we will preserve the integrity of justice, and transmit the priceless thing of human liberty to those who shall come after us.

More than half a hundred legal periodicals are published in the English language and are turning out great masses of the most critical examination of legal questions to be found anywhere. They come near being the lawyer's most important and helpful secondary source of matter for the solution of his day-to-day legal problems. Yet the subscription lists of these law journals indicate that this important material is not being consulted regularly by the great mass of lawyers, which, to those knowing the excellence of the work being published in these journals, is a fact difficult to understand. Quite astounding and more disappointing is the fact that the matter in these journals is not being digested in the Digest System. Until the latter is done, lawyers wanting to get at this most valuable material can consult *"Index to Legal Periodicals and Law Library Journal"* a journal which issues quarterly indexes of sixty-five legal periodicals and cumulates in the last issue of each year all the material indexed during that year. This journal is published by the American Association of Law Libraries, the president of which is Frederick C. Hicks, Columbia University, New York City. The committee in charge of the work of indexing legal periodicals for the association is composed of Franklin O. Poole of the Bar of the City of New York, George S. Goddard, State Librarian of Connecticut, Gertrude E. Woodard of the University of Michigan, and E. A. Feazel, of the Cleveland Law Library Association.

Joseph H. Drake writing in the Michigan Law Review (February) under the title, "The Rule of Law and The Legal Right," undertakes to disentangle some of the knotty *contrarieties of decisions in the law of damages*. He philosophizes on the source of these conflicts thus:

> The emphasis on the study of cases during the last half century has had the revivifying and stimulating influence upon the science of law which is characteristic of every return to the sources. Because of this simple change in the method of approach we have made our law more scientific, and whether the term be used as a reproach or a commendation, all of us, both theorists and practitioners, for better or for worse, have become case lawyers, in that we all believe that law is the body of rules recognized or acted upon in courts of justice. But we have frequently gone astray by following the rule without recognizing that return to the sources means a constantly repeated return to the particular source, for the purpose of formulating new rules for the enforcement of steadily developing rights. A rule, a definition, or a maxim of law, established by a decision of the sixteenth century, under the influence of our theory of *stare decisis* and of the syllogizing tendency so prevalent in the courts affected by eighteenth century philosophy, may become a precedent for deciding a case which involves elements entirely different from those on the basis of which the rule was originally established. We have here the old familiar fallacy of the Schoolman. "Man is a featherless biped," but "a plucked chicken is a featherless biped"; *ergo*, "a plucked chicken is a man." An unassailable conclusion, if we admit the validity of our major premise. And the only way to remedy this grotesque conclusion is to make a more careful analysis of the essential characteristics of man and, by a process of induction, to form a more accurate definition which may then be used as a corrected major premise.

The law as to *survival in death by a common disaster* is discussed by Frederick A. Wislizenus in the January issue of the St. Louis Law Review.

In considering the matter of *changing the Constitution of the United States* Charles Willis Needham of Washington, D. C., raises the question

> Whether the time has not come when we should amend Article V and provide that proposals for amendments be by a constitutional convention duly called to consider the subject, composed of delegates elected by the people of the various states, and that proposals by such conventions should be submitted to the people in each state for a direct vote thereon, giving a chance to adopt or reject any amendment or all the amendments proposed," University of Pennsylvania Law Review (March).

An interesting arrangement and discussion of the cases on *the Delegation of Power to Boards and Commissions* have been made by Walter Carrington of Charlottesville, Virginia, for the March issue of the Virginia Law Register.

Under the heading, *Torts without Particular Names* Jeremiah Smith in the University of Pennsylvania Law Review (January) discloses a large body of actionable wrongs for which we have no names and in addition makes many well considered suggestions for improvements in the terminology of the law of torts.

ORIGINAL POWER TO LEVY INCOME TAX

Consideration of Kind of Income Tax Law That Would Have Been Constitutional Prior to Sixteenth Amendment

By EDWARD A. HARRIMAN
Of the Washington, D. C., Bar

IT IS settled that Congress prior to the Sixteenth Amendment had power to levy an income tax (Brushaber v. Union Pacific R. R., 240 U. S. 1, 17).

By this ruling, "It is settled that the provisions of the Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous and complete plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived, that is, by testing the tax not by what it was, a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed." (Stanton v. Baltic Mining Co., 240 U. S. 97, 112, 113.)

The Sixteenth Amendment "did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income." (Eisner v. Macomber, 252 U. S. 189; Evans v. Gore, 253 U. S. 245.)

The December number of the Journal contains a powerful criticism by Mr. Harry Hubbard of the construction placed by a majority of the Court upon the words "from whatever source derived." It is therefore of interest to consider what kind of an income tax law would have been constitutional prior to the Sixteenth Amendment. There never was "any such person as Mrs. Harris," for no income tax law ever passed by Congress prior to the Sixteenth Amendment was constitutional, and no income tax law in the sense in which that term is ordinarily understood, could have been constitutional. The ordinary notion of an income tax law is that the determining factor in the law is the income of the person taxed, and no Federal tax law based on the income of the person taxed was constitutional prior to the Sixteenth Amendment. (Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; 158 U. S. 601.)

Nevertheless, Congress could have levied something which the Supreme Court calls an income tax, prior to the Sixteenth Amendment, although it never did so, and by no human possibility would ever have done so. The reason for the practical impossibility of such a tax law can readily be seen from the analysis of the necessary provisions of such law:

1. The first provision in a constitutional income tax law prior to the Sixteenth Amendment would have been a levy of a genuine income tax to the full extent of the constitutional limitation. An income tax is invalid not because it is an income tax, but only in so far as it is a direct tax. An income tax in the true sense, therefore, must have been confined to incomes of such a character that the tax could be sustained as an indirect tax. If the tax is levied on incomes derived from business, franchises, employments and vocations, it is called an excise tax, and is, therefore, indirect. (Pacific Insurance Co. v. Sole, 7 Wallace, 433.)

The Act would, therefore, have levied an income tax to the extent that such tax could be upheld as an excise tax.

2. By reason of the constitutional requirement of the apportionment of direct taxes, no true income tax could have been levied on incomes derived from property. Nevertheless incomes derived from property were not exempt from taxation prior to the Sixteenth Amendment. Mr. Hubbard maintains (Journal, Vol. VI, page 202) that "as there was no power in Congress prior to the Sixteenth Amendment to apportion the tax in proportion to incomes, there was no power to levy an income tax." If the phrase "income tax" is to be defined as a tax *apportioned* to incomes, Mr. Hubbard is correct. If, however, it is to be defined as a tax *levied* on incomes, he is not correct. When the Supreme Court says that Congress had power prior to the Sixteenth Amendment to levy an income tax, it has used the latter definition, and not the former. How, then, could Congress have levied a constitutional direct tax on incomes? To answer this question, we must look at the method which was actually used by Congress in the levy of direct taxes:

> By the Act of July 14, 1798, when a war with France was supposed to be impending, a direct tax of two millions of dollars was apportioned to the States respectively, in the manner prescribed, which tax was to be collected by officers of the United States and assessed upon "dwelling houses, lands, and slaves," according to the valuations and enumerations to be made pursuant to the Act of July 9, 1798, entitled, "An act to provide for the valuation of lands and dwelling houses and the enumeration of slaves within the United States." 1 Stat. 597, c. 75; Id. 580, c. 70. Under these acts every dwelling house was assessed according to a prescribed value, and the sum of fifty cents upon every slave enumerated, and the residue of the sum apportioned was directed to be assessed upon the lands within each State according to the valuation made pursuant to the prior act and at such rate per centum as would be sufficient to produce said remainder. By the act of August 2, 1813, a direct tax of three millions of dollars was laid and apportioned to the States respectively, and reference had to the prior act of July 22, 1813, which provided that whenever a direct tax should be laid by the authority of the United States the same should be assessed and laid "on the value of all lands, lots of ground with their improvements, dwelling houses, and slaves, which several articles subject to taxation shall be enumerated and valued by the respective assessors at the rate each of them is worth in money." (3 Stat. 53, c. 37; Id. 22, c. 16.) The act of January 9, 1815, laid a direct tax of six millions of dollars, which was apportioned, assessed, and laid as in the prior act on all lands, lots of grounds with their improvements, dwelling houses, and slaves. These acts are attributable to the war of 1812.
>
> The act of August 5, 1861 (12 Stat. 292, 294, c. 45), imposed a tax of twenty millions of dollars, which was apportioned and to be levied wholly on real estate, and also levied taxes on incomes whether derived from property or profession, trade or vocation (12 Stat. 309), and this was followed by the acts of July 1, 1862 (12 Stat.

432, 473, c. 119); March 3, 1863 (12 Stat. 713, 723, c. 74); June 30, 1864 (13 Stat. 223, 281, c. 173); March 3, 1865 (13 Stat. 469, 479, c. 78); March 10, 1866 (14 Stat. 4, c. 15); July 13, 1866 (14 Stat. 98, 137, c. 184); March 2, 1867 (14 Stat. 471, 477, c. 169); and July 14, 1870 (16 Stat. 256, c. 255).—Pollock v. Farmers' Loan & Trust Co., 157 U. S. 572.

It will be seen from this statement, first, that the entire amount of the direct tax to be levied on property was apportioned among the States; second, that the quota of each State was raised, under the Act of 1798, by an arbitrary assessment of slaves and dwelling houses to raise a certain amount of the tax, and by assessment of the residue of the sum apportioned upon the lands in such State according to their valuation. By the Act of 1813 the sum apportioned was assessed "on the value of all lands, lots of ground with their improvements, dwelling houses and slaves." The Act of 1815 followed the Act of 1813. The Act of 1861 levied the sum apportioned wholly on real estate. From these precedents, therefore, which do not appear to have been questioned, it appears that having apportioned among the States the total amount to be raised by direct taxation, Congress has the power to classify the subjects of taxation within the State from which the tax is to be collected. If, therefore, Congress had desired to raise one hundred million dollars by direct tax on incomes from property, the following procedure would have been necessary:

First, an apportionment of the entire sum among the States. With a population of one hundred millions, a State having one million population would have an apportionment of one million dollars tax, and a State with two million population would have an apportionment of two million dollars. Second, an assessment of the sum so apportioned against the incomes of the people in each State. Ordinarily an income tax is levied by a fixed or graduated percentage on incomes, such percentage being determined at a date prior to the accrual of such incomes. This method, however, would have been impossible in 1900, for the obvious reason that the total amount to be raised by the tax was predetermined. The only way, therefore, in 1900, in which Congress could have levied a tax on incomes from property for the year 1900, would have been by providing, first, that all incomes should be returned, or all incomes over a certain amount should be returned; and, second, that the percentage of tax payable by each income taxpayer in that State should be determined by levying a tax of such proportion of all of the taxable incomes as should be sufficient to equal the total amount of the tax apportioned to that State. No plan for a graduated tax could possibly have been worked out in advance. The only way in which a graduated tax could have been levied on the incomes for 1900, would have been to procure returns of all such incomes, and then, having secured such returns, to enact a law in 1901 fixing a graduated tax at such a rate as to collect the amount apportioned to that particular State. In the case of a flat income tax, a person living in one State with an income of ten thousand dollars might pay several times as much as a person living in another State with the same income. In the case of a graduated income tax, it would be impossible to apply the same rate of graduation to any two States.

Since it is direct taxes which must be apportioned, it is clear that having apportioned a direct tax, Congress had the right to raise a portion of the sum so apportioned by direct tax on property and the balance by direct tax on incomes. If, then, the apportionment of a direct tax to a particular State amounted to $1,000,000, Congress could direct that $500,000 be raised by an assessment on property and $500,000 by an assessment on incomes from property. The owner of productive real estate might object, and give as a ground for his objection the statement of the Court in Pollock v. Farmers' Loan & Trust Co. (157 U. S. 581) that "an annual tax upon the annual value or annual user of real estate, appears to us the same in substance as an annual tax on the real estate which would be paid out of the rent or income." The identity "in substance," however, of a tax on land and a tax on the income from land, does not seem to have prevented any taxing body as yet from collecting both taxes.

To sum up, therefore:

1. Congress had original power to levy a tax on incomes.

2. In so far as incomes are derived from business, franchises, employments, and vocations, a tax on such incomes is an excise or indirect tax and might, therefore, be levied as a true income tax having direct relation to the amount of the income received.

3. A tax on incomes derived from property is a direct tax and therefore had to be apportioned in the same manner as a tax on property itself.

4. When by apportionment Congress had fixed the sum to be raised in each State, it had the power to collect such sum from the incomes of taxpayers in that State derived from property, or at least, from property in that State.

5. As the amount of tax was fixed in advance by the apportionment, no rate of taxation could be fixed in advance.

6. No graduated tax on incomes could, therefore, be levied until returns of those incomes for the preceding year had been made.

7. Neither a flat rate nor a graduated rate of taxation on incomes could possibly be the same in any two States.

8. Whether the original power of Congress to levy a tax on incomes consisting (a) of an excise tax on incomes derived from business, franchises, employments and vocations having relation to the amount of the income; and (b) of a tax apportioned among the States collected from incomes in each State, with no possibility of fixing a rate of taxation in advance, with no possibility of a uniform flat rate in any two States, or a uniform graduated rate in any two States, was the power which the Constitution originally gave to Congress, is a question settled from a legal standpoint by a majority of one, in the case of Pollock v. Farmers' Loan & Trust Co.

9. Whether the existence of this original power to levy a tax on incomes by apportionment, a power so narrow and so preposterous in its practical application that it was never exercised, justifies the conclusions which have been drawn from it as to the construction of the Sixteenth Amendment, is a matter of individual opinion.

Long Terms of Judicial Service

Justice Joseph B. Moore was circuit judge eight years when he was elected a member of the Supreme Court of Michigan. He is now serving his twenty-sixth year as a member of that court. He has just been elected for a term of eight years to succeed himself.

PANAMA CANAL TOLLS EXEMPTION

Hay-Pauncefote Treaty and Right of United States to Exempt Our Coastwise Trade from Payment for Passage

By Horace Stringfellow
Of the Montgomery (Ala.) Bar

BY Act of Congress, "vessels engaged in the coastwise trade" of the United States were exempted from payment of tolls for the use of the Panama Canal. At the request of President Wilson this exemption was repealed by Act of Congress of June 15, 1914, with the reservation, however, that such repeal should not be construed as a waiver of the right of the United States to discriminate in favor of its vessels by exempting the vessels of the United States or its citizens from the payment of tolls for passage through the canal, or as waiving or impairing any right of the United States with respect to the sovereignty over or ownership, control, and management of such canal, and the regulation of the conditions and charges of traffic through the same. It is now proposed to restore such exemption, and the question arises whether the United States can provide that no tolls shall be levied upon vessels engaged in its coastwise trade, for passage through the canal, without violating the provisions of the treaty with Great Britain, called the Hay-Pauncefote treaty, which "superseded" the Clayton-Bulwer treaty of 1850.

The Hay-Pauncefote treaty between the United States and Great Britain, "to facilitate the construction of a ship canal to connect the Atlantic and Pacific oceans," is uncertain in many of its terms, its want of definiteness in material particulars creating the impression that certainty in expression was thought by its negotiators to be a bar to agreement. Thus in the material matter of the right of the United States to fortify the canal, the treaty, as first proposed, provided that "no fortification shall be erected commanding the canal, or the waters adjacent." This provision must have been objected to on behalf of the United States, and the objection being allowed, it was merely omitted from the treaty, instead of affirmatively stating that fortification was permitted; and the right of the United States to fortify the canal was left to interpretation, to be gathered from the provision therein, that "The United States however shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder."—which was in the treaty as first proposed—and from the general provisions thereof. This uncertainty in expression exists in the matter of the statement of other rights of the United States, as the contemplated owner of the canal, which are also left to interpretation by the parties, the only declaration therein of such rights being the provision that, subject to the provisions of the treaty, the United States "should have and enjoy all the rights incident to such construction," and the further provision that it should have "the exclusive right of providing for the regulation and management of the canal."

Where a treaty is uncertain in any of its terms, either party thereto has the right to make and act upon its own interpretation thereof—subject of course to the rule of good faith—until the difference between them has been settled, by negotiations, arbitration, or war.

As the Hay-Pauncefote treaty provides that the United States could construct the canal at its own cost, without any participation in its regulation or management by Great Britain, the United States has all of the rights of an absolute owner, except as such rights may be limited by the provisions of the treaty.

Section 1 of Article III of the Hay-Pauncefote treaty provides:

> The canal shall be free and open to the vessels of commerce and war of all nations observing these rules, on terms of absolute equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect to the conditions of traffic, or otherwise. Such conditions and charges of traffic shall be just and reasonable.

Although it may be said that the words "all nations observing these rules" did not include the United States, it is manifest from the general purpose and intent of the treaty as declared therein, that it was intended that there should be no discrimination between the vessels of the United States, or of its citizens, and the vessels of any other nation observing such rules, their citizens or subjects, as well as no discrimination between the vessels of such other nations, their citizens or subjects.

It is stated in the Hay-Pauncefote treaty that its purpose was to facilitate the construction of a canal under the auspices of the United States and to remove any objection thereto that might arise out of the convention called the Clayton-Bulwer treaty of 1850, "without impairing the general principle of neutralization, established by Article VIII of such convention." The general principle of neutralization established by Article VIII of the Clayton-Bulwer treaty—which contemplated the construction of a canal under the joint protection of the United States and Great Britain—is that "the canals or railways being open to the citizens and subjects of the United States and Great Britain on even terms shall also be open on like terms to the citizens and subjects of every other nation which is willing to grant thereto such protection as the United States and Great Britain engage to afford." As "the general principle of neutralization" thus made a part of the Hay-Pauncefote treaty intended that the canal should be open to the vessels of citizens or subjects of all nations agreeing thereto, upon "even terms" with the vessels of citizens of the United States, that is, without any discrimination between them, the Hay-Pauncefote treaty cannot be construed as permitting discrimination in favor of vessels of the United States without impairing such general principle, and this the Hay-Pauncefote treaty declares was not intended by the parties.

The traffic, however, within the meaning of Section I of Article III of the Hay-Pauncefote treaty, as to which it declares there shall be no discrimination in favor of vessels of citizens of the United States, is

traffic in which the citizens or subjects of Great Britain, or such other nations, have the right to participate with the citizens of the United States. If the United States has the right to exclude the subjects of Great Britain and the citizens or subjects of other nations from participation in a particular traffic, there can be no discrimination within the meaning of the treaty, or otherwise in the treatment by the United States of its citizens in relation thereto. Thus the United States has the perfect right to exclude the vessels of citizens or subjects of other nations from engaging in its coastwise traffic or trade, or to permit them to engage in such traffic upon such terms or conditions it may deem proper, or expedient, however onerous or discriminatory; and this right remains unimpaired by the Hay-Pauncefote treaty, although the canal may be used by the vessels of citizens of the United States in engaging in such traffic. It is clear therefore that the United States has the perfect right to exempt the vessels of its citizens engaged in its coastwise trade or traffic from the payment of canal tolls, when engaged therein, without such exemption being in any sense a discrimination within the meaning of the Hay-Pauncefote treaty.

But paragraph 1 of Article III of the Hay-Pauncefote treaty further provides that "Such conditions and charges of traffic shall be just and equitable." Charges for traffic, or tolls to be paid by the vessels of the citizens or subjects of Great Britain, or of such other nations, for the use of the canal, would not be "just and equitable" if the United States, exempting its vessels engaged in its coastwise trade from the payment of tolls, should increase such tolls to indemnify itself for the loss of revenue occasioned by such exemption. Even though the increased tolls when considered in and of themselves should be just and equitable—the limit of the right of Great Britain or such other nations to object thereto—an increase of tolls following such exemption would subject the United States to the imputation of making such increase to indemnify itself, unless the cost of the passage of its vessels engaged in such coastwise trade, and the proportionate share of such vessels of the cost of maintenance and protection of the canal, and of the investment return, should in some fair manner be considered and allowed in fixing the amount of the return required. On the other hand, if the tolls prevailing prior to such exemptions—and not made in contemplation thereof—remain in force, such exemption would furnish no argument to show that such tolls or charges were in and of themselves unjust or inequitable, particularly if they had not been objected to for such reason. In such case the United States would clearly suffer the loss of revenue occasioned by such exemption, and where, as has been shown, it does this, neither Great Britain nor any other nation observing the rules stated in the treaty can justly complain of such exemption.

WORK OF SECTIONS AND COMMITTEES

Recommendations of Committee on Jurisprudence and Law Reform

The review by Professor Osborne of the work of the American Bar Association in Procedural Reform is interesting and encouraging, especially to the Committee on Jurisprudence and Law Reform, which has been engaged in this task for the last ten years. The only addition which I would make to his admirable statement is this:

At the last meeting of the Association the Committee recommended the passage of a bill inserting a new section in the Judicial Code to be numbered 274-d., as follows:

> No action or proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.
>
> The Supreme Court may adopt rules for the better enforcement and regulation of this provision.

The Association approved the recommendation and the bill was introduced in the last Congress. Meanwhile the Supreme Court of Michigan decided (Anway vs. Grand Rapids Ry., 179 N. W. 350) that there was no power under the constitution of that state to authorize a court to render a decision when there was no actual controversy. This decision is based upon much the same ground as that of the Supreme Court in Muskrat vs. United States, 219 U. S. 346. This is to the effect that the judicial power of the Federal courts extends only to "actual controversies arising between adverse litigants." (Ibid, p. 361.) The Committee therefore decided to recommend the amendment of the act as submitted to the Association by prefixing the words: "In cases of actual controversy." This is the language of an act on the same subject which was adopted by the Legislature of Kansas in January last. A provision similar to the bill originally recommended to the Bar Association is also embodied in the Practice Act adopted by the Legislature of New York in 1920 and which will go into effect October 1, 1921. This does not contain the words, "In cases of actual controversy." With this amendment the bill has been introduced by Senator Nelson in the present Congress (S-1012).

Meanwhile the Commissioners on Uniform State Laws have been considering the same subject and have given it careful attention. They have agreed upon a form of a bill which they recommend for adoption by the State Legislatures. The subject has also been considered by the Commerce Committee of the American Bar Association.

After conference between members of these several committees the Committee on Jurisprudence and Law Reform is recommending to the Association the addition of two sections to the bill now pending in the Senate. One gives the right to apply to a court upon petition for further relief based on a declaratory judgment. The other gives power to the court to submit to a jury the determination of issues of fact which may become involved in the hearing upon a declaration of right or the granting of further relief based thereon.

Beside this subject of declaratory judgments the report of the Committee on Jurisprudence and Law Reform which will be submitted at the Cincinnati meeting of the American Bar Association, will cover the following subjects:

1. Removal of causes to the Federal from the state courts.
2. Appellate jurisdiction of the Federal courts.
3. The pending revision of the United States Statutes. A bill for this purpose passed the House

of Representatives in the last Congress and has again passed the House in the present Congress (H. R. 12). When the Bar Association Committee was heard in reference to this revision before the Senate Committee in January last, it was enabled by the assistance of Mr. Parkinson to point out numerous instances in which the language of the revision was inaccurate. It is a fair question whether in view of the excellent unofficial editions of the consolidated general laws of the United States, one of which is Barnes' Federal Code, the other being the work of the West Publishing Company, such an official revision is required at the present time. In any case it is clear that the greatest pains should be taken to ensure its accuracy.

4. The Concurrent Resolution (H. R. 10) which has been introduced in the House by Mr. Graham of Philadelphia and which was drawn and is being urged by a committee of which Mr. Thomas B. Felder is Chairman and Mr. William L. Ransom is Secretary. This provides for a joint committee of the two Houses of Congress "to be appointed to consider what legislation in relation to United States courts, procedure therein and judgments thereof would tend to improve the administration of justice." Many of the statutes on this subject were codified in what is known as the Judicial Code, which was approved March 3, 1911. Experience has dictated certain improvements in this code which have been made from time to time by acts of Congress and by rules of the Supreme Court. The first object of these improvements has been to secure greater simplicity in procedure, greater dispatch of business and the decision of cases upon the merits without regard to technical errors which do not affect the merits. Still it must be admitted that this code does not embody all the statutes relating to Federal procedure.

The general character of these improvements is stated in Professor Osborne's letter before referred to. Many of us are of the opinion that the codification and its amendments thus effected have established an excellent system of procedure in the Federal courts. No doubt there is room for further improvement. Two points which were urged by Mr. Felder upon the Committee of the House are certainly of great importance. They have been dealt with by the American Bar Association. An increase in the salary of the Federal judges in many of the districts is of great importance. In the original organization of the Federal courts there was a distinction in the salaries paid to judges in the different districts just as there is in the salaries paid to United States District Attorneys. The statute which equalized the judicial salaries was a mistake. When Mr. Root was in the Senate he urged the passage of a bill making a change in this respect, so that the salaries of the Federal judges in any district should not be less than that of the judges of the highest state court of original jurisdiction in that district. This unfortunately failed of passage.

Another matter which was urged by Mr. Felder upon the House is the congestion of business in many of the districts, owing to the great extension by recent statutes of the jurisdiction by the Federal courts in criminal cases. Many offenses have been created by Act of Congress which do not involve moral turpitude, but the trial of which requires a great deal of time. One method of dealing with this subject is proposed in a bill which was pending in the last Congress and which has again been introduced in the present Congress by Mr. Barbour (H. R. 2870). This gives to the judges of the United States courts authority to appoint commissioners who would have the power not only of hearing charges against persons accused of misdemeanors but of trying and inflicting sentence upon them. Another method which has been proposed is to increase the number of the judges in the districts in which there is congestion at present. Another method still would be to divide these districts. But experience in the last twenty years has shown that the subdivision of districts involves an increase of judicial machinery which is undesirable and that the object sought may be better obtained by increasing the number of judges.

In connection with this matter of statutory offenses a bill is pending in Congress, introduced by Mr. Lee of New York (H. R. 5030), which provides that the conviction for such offenses shall not involve the deprivation of civil rights unless the judge or the jury shall so determine either in the verdict or the sentence. The American Bar Association Committee is recommending an amendment to this bill in order to produce uniformity of administration in the different districts. This would enact that a sentence upon an indictment for felony of only a fine or imprisonment for a year or less shall not involve the loss of citizenship or of civil rights. A sentence for more than that term would have the same effect as at present.

The Association will perceive that these subjects are of great importance and the Committee ask very careful consideration for the report which deals with them, a copy of which will be sent to every member.

EVERETT P. WHEELER.

Public Meeting Commerce Trade and Commercial Committee

A wide-open public meeting of the Committee on Commerce, Trade and Commercial Law of the Association was held in the Assembly Room of the Merchants' Association of New York, Woolworth Building, 233 Broadway, New York City, May 2, 3 and 4, 1921, pursuant to invitation and "docket" dated February 28, 1921. This appeared in full in the March number of the JOURNAL and thus reached the desks of some 12,000 lawyers. In addition, 2,500 special invitations were issued to financial and commercial interests and to rail and water carriers.

The following members of the Committee were present: Francis B. James, of Washington, D. C., Chairman; W. H. H. Piatt, of Kansas City, Mo.; Joseph F. O'Connell, of Boston, Mass., and Julius Henry Cohen, of New York, N. Y.

In opening the meeting the Chairman said:

"Gentlemen: This Committee has conceived the idea that the American Bar Association is not a mere private association, but is a quasi-public organization in its nature. This is the first time that idea has been publicly expressed. The Committee also believes the great trade organizations (many of which are here represented) are none of them strictly private in their nature, but rather quasi-public. Therefore, this Committee does not want any star chamber meetings, which has been the general practice of Bar Associations ever since they were first organized. The Committee be-

lieves it should hold public meetings, to discuss the problem of bringing the law into harmony with the actual usages and customs of business and commerce. The Committee has laid down two limitations on its activities:

"First: If there be usages, customs or practices in business which are unethical, the Committee should condemn them; and

"Second: If there be suggestions or recommendation of laws which are not desirable in the public interest, the Committee should condemn them.

"These are two principles as to which every American who feels a deep sense of pride and a genuine interest in the welfare and progress of his country will undoubtedly agree. The Committee believes that any usages, customs or practices of trade, business or Commerce, no matter how long they may have existed, that are contrary to general public policy and the public interest should receive the condemnation of any organization such as the American Bar Association or any committee thereof.

"The views of one of the ablest men in public life who has done much in the public interest—a man who has risen from a very humble origin to a position of great prominence in public life, Honorable Edgar E. Clark, Chairman of the Interstate Commerce Commission—are expressed in response to an invitation extended by the Committee in a letter dated April 16, 1921, as follows:

> "The subjects listed for consideration at this meeting are, many of them, important and of much interest, and it is a good thing to have such subjects discussed in open forum by representatives of those who are affected by existing law or who would be affected by changes in the law."

"We are sure Mr. Clark has there expressed a sentiment that everyone here, and, in fact, every good American citizen, will heartily endorse.

"It is well that these subjects of great public interest should be discussed in open forum by the representatives of those who are most directly affected.

"For a long time there has existed in the minds of many a strange idea that the man who has studied these subjects academically, and who has not any private interests to serve, should make up the personnel of such bodies as this Committee; but we do not subscribe to that idea. We think, rather, that such bodies as this Committee should be composed chiefly of men who are more or less experts on the subjects to be considered, men who have made a study of them not merely from an academic standpoint; and that these experts should call to their aid men who know the subjects, not academically, but from actual practice and actual observation; so that instead of having a mechanical application of the rules of law, we may have the results of practical experience crystallized into law."

The meeting was attended by representatives of financial and commercial organizations, by representatives of rail and water transportation companies, by representatives of the Commissioners on Uniform State Laws, and by representatives of Committees of the American Bar Association. Thus thousands were represented through their duly constituted representatives.

Some subjects were discussed other than those which appeared on the regular "docket," but the Committee announced that it will not recommend the passage of either State or Federal laws on subjects not duly docketed.

The proceedings were duly reported by the official reporter of the American Bar Association and a transcript thereof covers 542 pages, and letters and documents also considered by the Committee will make at least a similar number of pages.

The report of the Committee dated June 1, 1921, will make about 100 pages covering the work of the Committee and its advisers covering a period of several years last past. The Committee is co-operating with other Committees of the Association where the subjects overlap into the field of commerce, trade and commercial law.

Special Committee on Admission to Practice

The last meeting of the Section of Legal Education authorized the chairman to appoint a special committee, of which the section chairman was also to be the chairman, with instructions to report to the section as to what measures, if any, may be taken by the section and by the American Bar Association to create conditions which will tend to strengthen the character and improve the efficiency of those admitted to the practice of law.

Mr. Root appointed Hugh H. Brown, of Tonopah, Nevada; James Byrne, of New York City; William Draper Lewis, of Philadelphia; George Wharton Pepper, of Philadelphia; George E. Price, of Charleston, West Virginia; and Frank H. Scott, of Chicago, as members of this committee. Mr. Shippen Lewis of Philadelphia has been chosen as Secretary of the committee.

The committee prepared and sent out to Bar Examiners, law school faculties, and lawyers specially interested in the subject of legal education, an elaborate questionnaire from the answers to which much valuable information and suggestions have been received.

The committee met in New York City, May 19 and 20. There appeared before the committee, to discuss various questions suggested by it, President Currier, of the New Jersey Law School, Newark, New Jersey; Charles A. Boston, of New York City, Vice-Chairman of the section; Dean Swan, of Yale Law School; Franklin N. Danaher, member of the New York Board of Bar Examiners; Dean Stone, of Columbia Law School; Reginald Heber Smith, of Boston; Dean Hepburn, of the University of Indiana Law School; Dean Pound, of Harvard Law School; Hollis R. Bailey, of Boston, member of the Massachusetts Board of Bar Examiners; Charles N. McKeehan, of Philadelphia, member of the Pennsylvania Board of Bar Examiners; Alfred Z. Reed, of the Carnegie Foundation; Walter W. Cook, of Columbia Law School, representing the Association of American Law Schools; and John B. Sanborn, of Madison, Wisconsin, Secretary of the section.

The committee is now preparing its report to the section, which will be published for the information of all members of the section, and which will come up for discussion at the meetings of the section in August.

Attention is called to the fact that under the by-laws of the section only those are entitled to vote at a meeting who have been enrolled or elected prior to the first session of such meeting. The Secretary is, however, authorized to enroll, by mail, any member of the American Bar Association who so requests.

WILLIAM AND MARY'S PIONEER AMERICAN LAW SCHOOL

By Robert M. Hughes
Of the Norfolk, Va., Bar

PRIOR to the American Revolution the only preparation for the Bar was study under some practitioner, except in the case of the few who were so fortunate as to afford a residence in England and a training in the Inns of Court.

The establishment of the law course at William and Mary is thus described by Jefferson in his Autobiography:

> On the 1st of June, 1779, I was elected Governor of the Commonwealth, and retired from the Legislature. Being elected also one of the Visitors of William and Mary College, a self-electing body, I effected, during my residence in Williamsburg that year, a change in the organization of that institution, by abolishing the Grammar School and the two professorships of Divinity and the Oriental Languages, and substituting a professorship of law and police, one of Anatomy, Medicine and Chemistry, and one of Modern Languages.

The resolution of the Board of Visitors making this change was dated December 4, 1779.

On December 28, 1779 the Faculty carried it into effect by a resolution which is noteworthy as the first application of the elective system. It reads:

> For the encouragement of Science, Resolved, That a student on paying annually one thousands pounds of Tobacco shall be entitled to attend any two of the following professors, viz., of Law & Police, of Natural Philosophy and Mathematics, of Moral Philosophy, the Laws of Nature and Nations & of the Fine Arts, & that for fifteen hundred pounds he shall be entitled to attend the three said professors.

The College Board included, among others, Jefferson, Blair, Madison, Randolph, Nelson and Harrison. They elected as the first professor George Wythe, styled by Jefferson the American Aristides, and a signer of the Declaration. He was one of the Chancellors of Virginia, and was notable as one of the first if not the first American judge to pronounce a legislative act unconstitutional. This he did in *Comth.* v. *Catron* (4 Call 5), staying:

> Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and, pointing to the constitution, will say to them, "here is the limit of your authority; and hither shall you go but no further."

His course was both thorough and practical. It was based upon Blackstone as a text book, accompanied by lectures showing the difference between English and Virginia law. R. H. Lee, in a letter to his brother, Arthur, in 1780, says of Wythe that he discharges his duties as professor "with wonderful ability, both as to theory and practice."

John Brown (later, one of Kentucky's first senators), then a student under Wythe, writes in 1780 describing the Moot Court and Parliament organized by the latter as part of his instruction. And Jefferson, in a letter to Ralph Izard written in 1788 gives substantially the same account of it.

Among Wythe's distinguished pupils were John Marshall, Spencer Roane, John Breckenridge and Francis Preston.

In 1789 Wythe was made sole chancellor, which necessitated his removal to Richmond and resignation of his professorship. He was succeeded by St. George Tucker, whose edition of Blackstone is an American classic. He advocated gradual freeing of the slaves, and in 1796 published a plan for the purpose, which was afterwards made part of the appendix to his Blackstone. He held the position till 1804, and was followed, first by William Nelson and then by Robert Nelson, who were succeeded by James Semple in 1820, and he by Beverly Tucker in 1833.

Judge Tucker filled the chair for nearly a decade. He was an extreme advocate of State Rights and disciple of the old order. His published lectures on pleading are as entertaining as a novel. His opposition to innovation may be gauged by the following comments on the act which first permitted a demurrer and plea to be filed at the same time in Virginia. He says:

> The antiquated idea that pleadings are a quest after truth is exploded. The old notion that a man should not blow hot and cold in the same breath is discarded as only worthy of the beasts and Satyrs, of whose talk we read in Aesop. Accordingly the defendant *uno flatu* may confess and deny the same fact, and the confession and denial are both put into the record, which was contrived by the unlettered wisdom of our ancestors to contain a precise and consistent statement of the facts of the case . . . So contrived, the judgment in its naked form testified to all the community and to all posterity that "such being the facts, such is the law." What it testifies now, who can tell? Truly the march of mind in these enlightened days has made great progress. . .
>
> The guillotine made Marat an important character in history. Let us at least be candid, and admit that perhaps the Huns and Alans, when desecrating and destroying the monuments of Grecian art, thought as favorably of their work as our lawgivers of their labors, in tearing down the pillars of the temple of Justice.

Judge Tucker was succeeded by Judge Scarburgh, who held the chair till his promotion to the Court of Claims. He was followed by Lucian Minor, a brother of John B. Minor, who served until his death in 1859. He was succeeded by Charles Morris, who acted till the College was closed on account of the hostilities in the vicinity during the Civil War.

In 1862 the main building of the College (which had just been restored from the fire of 1859) was set on fire by a mob of drunken soldiers, whose irresponsible vandalism was as much deplored in the North as in the South. But the damage was done all the same. As no insurance was available in such case, the crippled endowment had to be used after the war for rebuilding, and it has since been impossible to revive the law department of the College, though its other activities are in full operation.

Let us hope that some philanthropist may yet reendow this, the first law school in America, and restore it to the rank it held so long.

In more than one respect this old law school blazed a path. One of the live subjects before the profession today is the amount of preparation requisite for a law degree. Certainly as early as 1792, and probably as early as 1779, an A.B. degree was required there as a condition of a law degree. The compilation of the College statutes of 1792 provided:

> For the degree of Bachelor of Law, the Student must have the requisites for Bachelor of Arts; he must moreover be well acquainted with Civil History, both Ancient and Modern, and particularly with municipal law and police.

ACTIVITIES OF STATE BAR ASSOCIATIONS

Secretaries of State Bar Associations are requested to send in news of their organizations. "News" means not only official statements of time, place and programs of regular meetings and the action there taken, but also reports of other interesting activities. In brief, anything showing what the membership, committees and leaders in the State Bar Association are thinking and doing with respect to matters of professional interest. Secretaries can help to make this department one of the most interesting in the Journal. The collection of reports will enable each State Bar Association to see every month what the others are doing and to avail itself of any suggestion contained in their activities. Contributions should be mailed not later than the 25th of each month and should be addressed to the editorial office, 1612 First National Bank Building, Chicago.

ARKANSAS

Endorsement of William Howard Taft for Chief Justice of the United States came just before the adjournment of the meeting of the Arkansas Bar Association at Hot Springs, June 3.

Ex-Governor Frank O. Lowden, of Illinois, delivered an address in which he emphasized the dangers of centralization of power in the national government and the necessity of maintaining local self government efficient and unimpaired. Following is a pertinent extract:

> The tendency for centralization of power is on, and it is being urged by the bureaucrats at Washington. Today they are using a new method. They are seeking to bribe the states with what they term "federal aid." We in the states are more or less responsible for this movement. We do not seem to realize that we pay for that federal aid just the same as if direct taxes were levied against us. We have been listening to the siren song of the bureaucrats at Washington as they sing of federal aid, and the worst consequence of it all is the insidious breaking down of the proper functions of the states. The municipalities should discharge their proper functions, the state its function, and the federal government the power delegated to it by the constitution.

GEORGIA

On June 3 the Georgia State Bar Association, in session at Tybee Island, adopted resolutions recommending former President Taft for appointment to the Chief Justiceship of the United States Supreme Court. These resolutions were presented by Judge Arthur G. Powell, of Atlanta and read as follows:

> Resolved, that while we are ever unwilling that the influences of the association should be used in any political work for the advancement of any man's ambition to public office, and are therefore careful expressly to disavow any political purpose in this resolution, nevertheless, the members of this association wish to express the sentiment that if the President of the United States should see fit to appoint to the vacancy in the Chief Justiceship of the Supreme Court Judge William H. Taft, the appointment would be most heartily welcomed by the bar and the people of our state and section. This illustrious jurist and ex-President is held in such universal love and esteem by the people of all sections of our country, irrespective of their political alliances, so as to fit him peculiarly for that great branch which is and ever should be impartial and non-partisan in its membership.

Col. A. R. Lawton, President of the Association, delivered the Presidential address. It was a presentation of interesting historical sidelights on Georgia's early conflicts through her own court system with the Supreme Court of the United States. Interesting addresses were made during the sessions by Reuben R. Arnold, of Atlanta, on "The Tendencies of the Times; Are We Going Forward or Backward?" by C. Murphy Candler, Chairman of the Georgia State Railroad Commission, on "Public Utility Regulation in Georgia;" Benjamin E. Pierce, of Augusta, on "Taxation;" Federal Judge Manton, of New York, on the "Full Obligation of American Citizenship;" Orville A. Park, of Macon, on "The History of Georgia as Recorded in the Reports of the Georgia Bar Association;" A. B. Lovett, of Savannah, on "The Bench as a School of Law;" Robert M. Arnold, of Columbus, on "Sunday Legislation."

The following officers were elected: Judge Arthur G. Powell, President; Judge J. R. Pottle, of Albany, First Vice-President; Harry S. Strozier, of Macon, Secretary; Z. V. Harrison, of Atlanta, Treasurer; Executive Committee: Chairman, Raiford Falligant, of Savannah; Walter A. Harding, of Macon; Hal Lawson, of Abbeville; Alex W. Smith, Jr., of Atlanta; with the President, Secretary and Treasurer as ex-officio members.

Vice-Presidents representing the Congressional districts: First, J. A. Branned, Statesboro; second, Judge J. R. Pottle, of Albany; third, John B. Curry, of Montezuma; fourth, H. H. Swift, of Columbus; fifth, Hughes Spalding, of Atlanta; sixth, R. C. Jordan, of Macon; seventh, Barry Wright, of Rome; eighth, Z. B. Rogers, of Elberton; ninth, W. A. Charters, of Gainesville; tenth, Lansing B. Lee, of Augusta; eleventh, John W. Bennett, of Waycross; twelfth, John S. Adams, of Dublin.

The attendance at this meeting was unusually good and sea-bathing and the various other pleasures which the place of meeting afforded were greatly enjoyed by the visiting lawyers and their families.

IDAHO

The Idaho State Bar Association has now in preparation the publication of a lawyers' directory, proceedings of the 1921 meeting, and a paper on examination of abstracts of title in the State of Idaho for distribution among its members. The general and special committees of the association have been appointed and are beginning work on the assigned matters.

ILLINOIS

The 45th annual meeting of the Illinois State Bar Association proved to be one of the very best in the history of the organization. Owing to the fact that Dixon is a town of less than 10,000 population the Board of Governors had some misgivings in accepting the invitation of the Lee County Bar, but the meeting had hardly opened when the members in attendance realized that the fact that the local bar association had more than made good and the visitors heartily approved the decision of the Board of Governors. The opening exercises were

held at Hazlewood, the summer home of E. H. Brewster, some three miles north of the city, in a natural oak-covered amphitheatre. President Logan Hay's annual address fitted the occasion admirably and was an analysis of the movement toward local bar associations which could not be obtained from book reading and showed deep thinking on the part of the speaker. Lawyers interested in the reasons for bar associations will do well to read this address.

The meeting of the Local and County Bar Associations was held at the Elks Club on the evening of June 9, and indicated that during the past year there has been greater interest in local bar associations than ever before. Several of the associations have held regular monthly meetings for the discussion of current legal subjects, and one association reports that it has a bi-weekly luncheon, at which the cases reported in the advance sheets of the Illinois and United States Supreme Courts are regularly discussed by its members. Plans were laid for regular meetings during the coming year in a number of the local bar associations and the State Association is listing a number of its members who offer their services in leading discussions on legal subjects.

The Friday morning session was given over to the report of standing committees and a discussion of the Proposed Judicial Article of the New State Constitution, the latter being presented by Hiram E. Todd, of Peoria, and Judge Harry Olson, of Chicago. At the afternoon session Honorable Charles S. Cutting, of Chicago, presented the general situation in connection with the Constitutional Convention and Honorable William L. Frierson, Solicitor General of the United States, delivered the annual address upon the subject of "The Federal Constitution as Recently Amended." The Solicitor General's address was an able presentation of the recent constitutional amendments and a warning against frequent amendments in the future.

The annual dinner was held at the Elks Club on Friday evening. Again the citizens of Dixon demonstrated their hospitality by the fact that the dinner was given by the house committee of the Elks Lodge and the waiters proved to be business men of Dixon, members of the Elks. The after-dinner talks were well chosen and both instructive and entertaining. Solicitor General Frierson responded to the toast "Our Guest," Roscoe L. Heavitin, of Marion, Indiana, spoke upon "Organization," Judge Charles V. Miles, of Peoria, discussed "The Judiciary," and Abel Davis, of Chicago, made an elegant appeal for the disabled soldiers in response to the title "A Nation's Obligation."

The meeting was closed by the session Saturday morning when the further reports of committees were presented. The more prominent reports were the report of the Committee on "Office Management," presented by Roger Sherman, of Chicago, Chairman, and which is the last word on modern management of law offices, and also the report of the "Committee on Fees," presented by Alexander D. King, of Chicago, Chairman, which contains the latest opinions of the membership of the Illinois Bar Association as to what should be a minimum charge for legal services for over one hundred different items of legal services.

For the first time the Association elected its officers by mail. A number of years ago there was a hotly contested election in which about 500 members voted. This year 746 members, or over 30% of the membership, participated in the election with the result that Mr. Silas H. Strawn, of Chicago, was elected President; Bruce A. Campbell, of East St. Louis, Vice-President; Roger Sherman, Chicago, and C. M. Clay Buntain, Kankakee, additional Vice-Presidents; R. Allan Stephens, Danville, Secretary; Franklin L. Velde, Pekin, Treasurer; Judge Oscar E. Heard, Freeport, and George H. Wilson, of Quincy, members of the Board of Governors.

The By-laws of the Association were amended to include on the Board of Governors the member of the State Executive Committee elected by the Federation of Local Bar Associations from each Supreme Judicial Court District, so that hereafter the Board of Governors of the Illinois State Bar Association will consist of the retiring President, six members elected by the membership at large and seven members elected by the local bar associations—one from each Supreme Judicial District in the state. With this action the Illinois State Bar Association takes another step toward making the association a purely representative organization.

R. ALLAN STEPHENS.

MICHIGAN

The recent meeting of the State Bar Association, held at Flint, is said to have been the most successful in the history of that organization. The following officers were elected: President, William W. Potter of Lansing; Vice-President, George E. Nichols of Ionia; Treasurer, William E. Brown of Flint; Secretary, Edson R. Sunderland of Ann Arbor; Directors: First Congressional District, Henry C. Walters, Detroit; Second, James H. Baker, Adrian; Third, Claire Jackson, Kalamazoo; Fourth, O. S. Cross, Benton Harbor; Fifth, Fred L. Maynard, Grand Rapids; Sixth, Walter S. Foster, Lansing; Seventh, J. Frank Wilson, Port Huron; Eighth, F. O. Eldred, Ionia; Ninth, Parm. C. Gilbert, Traverse City; Tenth, J. E. Duffy, Bay City; Eleventh, Sherman T. Handy, Sault Ste. Marie; Twelfth, Arthur H. Ryall, Escanaba; Thirteenth, John B. Corliss, Detroit.

The special report of the committee on Legislation and Law Reform on the proposal for an intermediate Appellate Court to relieve the congestion in the Supreme Court was one of the notable features of the meeting. The report covered the various devices that have been adopted in this country to deal with the question of relieving the appellate courts, viz.: restrictions placed upon the right to appeal; creation of inferior appellate courts to take care of a portion of the appeals; appointment of commissioners to aid the Supreme Court in clearing up its docket; increase of the number of judges on the Supreme Court; organization of the Supreme Court into divisions.

The report concludes with the statement that it is interesting to note that the Michigan Declaratory Judgment Act has been adopted substantially *in haec verba* by the State of Kansas within the last three months, and that the Massachusetts Judicature Commission has just recommended the adoption of a declaratory judgment act in that State. It declares that Michigan "which enacted the first unrestricted declaratory judgment law, ought not

to be obliged to see her sister States enjoy the benefit of so useful a remedy while unable to employ it herself."

Another report, particularly complete and interesting, was that of the special committee on Incorporation of the State Bar Association. It went into details of the many legal questions of importance involved and appended the bill the essential features of which appeared in the May issue of the JOURNAL.

MISSISSIPPI

Hon. G. T. Fitzhugh of Memphis, Tennessee, delivered the annual address at the recent meeting of the Mississippi Bar Association, held at Brown's Wells, near Hazelhurst. Other features of the program were addresses on "The Reciprocal Duties of the Presiding Judge and the District Attorney," by Hon. Jeff Truly, former Associate Judge of the State Supreme Court of Mississippi; "The Overflow of the Law and the Streams Contributing Thereto," by James S. Sexton; "The Mississippi Lawyer," by F. M. Curlee, President of the Mississippi State Bar Association; "The Philosophy of Punishment," by Julian P. Alexander, United States District Attorney for the Southern District. The address of welcome was delivered by James S. Sexton of Hazelhurst and responded to by Charles L. Garnett, of Columbus, Vice-President of the Association.

NEBRASKA

Various measures in which the State Bar Association was particularly interested were passed at the recent session of the legislature. One of these permits a verdict in civil cases to be rendered by five-sixths of the jury, after six hours' deliberation. This enactment was the result of a provision for such a verdict in the new state constitution adopted September 21, 1920. The provision for the period of deliberation, however, was inserted at the recommendation of the State Bar Association at its last annual session in December, 1920.

The bills relating to procedure, most of them designed to eliminate technicalities, were directly sponsored by the legislative committee of the Bar Association. The new pardons and parole law was in a large measure the result of suggestions made by the Association and various members thereof in connection with the general question of pardons and paroles during the past two years. It establishes a new board of pardons composed of Governor, Secretary of State and Attorney General and gives it supreme power to remit fines, grant commutation, pardons or paroles. It also gives it the customary power to subpoena witnesses. It is made unlawful for any person to approach or discuss with any member of the Board any matter pertaining to a matter of pardon or parole except at a formal hearing.

The new indeterminate sentence law allows the judge to fix minimum and maximum terms for convicted persons and requires the court to furnish detailed reports of the case to the Board.

SOUTH DAKOTA

At the coming meeting of the State Bar Association, to be held at Watertown, Aug. 3 and 4, the special committee on a Minimum Attorneys' Fee Schedule will report the progress made in the use of the schedule approved at the last meeting and also such changes or additions as it may deem advisable.

It is understood that the State Bar Associations of Illinois and South Dakota are the only State Bar Associations which have so far formally recommended the use of a minimum fee schedule.

At the Twenty-first Annual Meeting, which was held at Sioux Falls, August 4 and 5, 1920, the annual address was delivered by Judge Oscar Hallan, of the Supreme Court of Minnesota on "The American Idea in Law." An address was also delivered by Judge James D. Elliott of Sioux Falls, the United States District Judge for the District of South Dakota, on "The Duty of American Citizenship." The subject of the address of the President of the Association, W. F. Bruell of Redfield, was "Men and Measures." Other addresses were by George E. Todd of Bridgewater on "The County Judge as a Practitioner," by Lewis W. Bicknell of Webster on "Courts Martial Law and Procedure," by Francis J. Parker of Deadwood on "The Relation of the States' Attorney to the Bar Association" and by Perry F. Loucks of Watertown on "Why We Should Adopt a Minimum Fee Schedule."

Probably the most important action taken by the Association was the approval of the report of the special committee above referred to. The following officers were elected for the year 1920-1921: President, Claude L. Jones of Parker; First Vice-President, Jason E. Payne of Vermillion; Second Vice-President, A. K. Gardner of Huron; Secretary, J. H. Vorhees of Sioux Falls; Treasurer, L. M. Simons of Belle Fourche.

VERMONT

The Vermont Bar Association was instrumental during the recent session of the Legislature, in bringing about two important pieces of legislation.

In the first place, the salary of the Chief Justice of the Supreme Court was increased by $1,500 while the salaries of the Associate Justices and of the Superior Judges were increased $1,000. The salary of the Chief Justice is now $5,500 and expenses, while that of the Associate Justices and of the Superior Judges is $5,000 and expenses.

In the second place, our Practice Act was so amended as to liberalize very materially the form of pleading available to a defendant. He may now answer the complaint either by denying all or certain allegations in the complaint, or by filing a brief statement of the facts in his defense, or by doing both; or he may file a general denial, having the force of a plea of the general issue at common law; and he may set up as many defenses as he has, whether inconsistent with the general issue or not, provided each defense is separately stated, and he shall, on motion of plaintiff, specify the defenses upon which he will rely.

BAR ASSOCIATION REPORTS

The Journal acknowledges receipt of the Annual Reports of the following Bar Associations:

Alabama, 1920; Arkansas, 1919; California, 1920; Connecticut, 1920 and 1921; Georgia, 1920; Illinois, 1920; Michigan, 1920; Minnesota, 1920; New Hampshire, 1920; New Mexico, 1920; South Dakota, 1919 and 1920; Tennessee, 1920; Canadian Bar Association, 1920; Association of the Bar of the City of New York, 1920.

LETTERS FROM BAR ASSOCIATION MEMBERS

Marbury vs. Madison

Topeka, Kan., May 28.—To the Editor: In Professor McLaughlin's review of Senator Beveridge's life of Marshall, published in the Journal of this month, it is said of the Marbury-Madison case: "Marshall backed into his decision; he discussed at length the merits of the controversy and then declared that the court had no jurisdiction—a most extraordinary procedure." This is the view that has been taken by many writers, including Carson (Supreme Courts, Vol. 1, p. 206), and McMaster (People of the United States, Vol. 3, pp. 167-8).

Was not the course of Chief Justice Marshall in this respect however fully justified by the accepted doctrine that a statute should not be declared unconstitutional unless such a ruling is absolutely necessary to a disposition of the case? Is it not true that until it had been determined that the plaintiff had a right to the relief sought and that mandamus was a proper remedy there was no occasion to investigate the validity of the Act of Congress undertaking to give the Supreme Court original jurisdiction in such a proceeding —at all events no occasion to hold the Act to be void? Was not the want of jurisdiction due solely to the invalidity of the statute, the situation in this regard being different from that presented in the Dred Scott case, where after holding that a Federal court had no jurisdiction of the case because the plaintiff lacked capacity to sue therein, the Act of Congress known as the Missouri Compromise was declared to be unconstitutional?—HENRY F. MASON.

Federal Practice and Newberry Case

Boston, Mass., May 14.—To the Editor: The Newberry case has sharply emphasized a great defect in Federal practice. Here was an indictment based on a statute which was unconstitutional. The point was promptly raised by the defendants and was well taken. The question did not depend on facts developed at the trial; it was basic and lay at the very threshold of the case.

But under the present practice there was no way in which it could be presented to an appellate court until the whole case had been tried by the jury. The defendants—and the Government as well—were forced to go through a trial lasting weeks, the unavoidable expenses of which would bankrupt a poor man, because there is no other way in which the preliminary question could be got to the upper court.

Such a condition is a reproach to the law. It is not necessary; and it does not exist in Massachusetts, nor, I believe, in most of the States. They have provisions whereby important questions of law may be reported by the trial court to the appellate court in advance of trial. The need of some such provision in the Federal law has long been evident to those who try cases in the courts of the United States. The situation presented by the Newberry case arises not infrequently; and the possibility of great hardship which that case so clearly illustrates exists in many less well-known cases, both criminal and civil.

An Act ought to be passed authorizing the District Courts to report important questions of law to the Court of Appeals or to the Supreme Court at any stage of the proceeding, like the statute which has for many years been in force in Massachusetts—to speak only of the State with whose practice I am familiar—and which has proved of great practical value. JAMES M. MORTON, JR.

National Bankruptcy Act

Fort Smith, Ark., May 17, 1921.—To the Editor: In your April issue of the JOURNAL is published a "Tentative Draft of Bill amending National Bankruptcy Act." It is stated that the Committee invites suggestions from those interested.

I offer the following suggestions:

Amend Sec. 4, clause a, as it now stands as amended by Act approved June 25, 1910, by adding thereto:

> But adjudication in voluntary bankruptcy shall not be made until creditors have had ten days notice by mail of the time and place of the hearing to be had upon the petition filed. At which meeting any creditor may show cause why the petitioner should not be adjudged a bankrupt; and the said meeting so called shall be in lieu of and dispense with the calling of first creditors' meeting after adjudication in bankruptcy.

As the law now stands and as it is the practice the adjudication is made on the ex parte petition of the petitioner to be adjudicated a bankrupt, and without any knowledge by the creditors or any one else interested that such proceedings are being taken, and the first knowledge of the adjudication that comes to the creditors is the notice to them of the time and place of a first creditors' meeting, to be held ten days or more after adjudication has been made.

In cases of involuntary bankruptcy the creditors and the person sought to be adjudged a bankrupt each have a day in court before adjudication is made or denied. The same rule should apply in cases of voluntary bankruptcy. By fixing the first creditors' meeting on the day for the hearing of the petition and dispensing with a first creditors' meeting after adjudication, if the adjudication is made, no additional expense or inconvenience is placed upon either the petitioner or creditors.

Sec. 48, clause a, as amended by Act approved June 25, 1910, fixes the commissions of trustees "on all moneys disbursed or turned over to any person, including lien holders," while Sec. 40, clause a, as amended, fixes a commission for referees only "on moneys disbursed to creditors by the trustee." Why this difference? The referee is concerned in the settlements made to see that all moneys passing through the hands of the trustee are paid to the proper parties, in fact makes the settlements and directs the payments. His time and labor are taken in seeing that the proper disbursement of all moneys of the bankrupt estate is made with the same care and painstaking as is required of him in "moneys disbursed to creditors." His commission should be on all moneys of the bankrupt's estate passing through the hands of the trustee, and not restricted to "moneys disbursed to creditors."

I, therefore, suggest that Sec. 40, clause a, be further amended by striking out "one per centum commissions on all moneys disbursed to creditors," and inserting in lieu thereof "one per centum on all moneys of the estate of the bankrupt coming into the hands of the trustee and disbursed or turned over by him to any person, including lien holders."

DANIEL HON.

Power to Amend Constitution

Green Bay, Wis., May 1.—To the Editor: That the power to amend, or the method of effecting amendment to the Constitution of the United States, should be otherwise restricted than as provided in Art. V can find no support in any rule of construction enforced by the courts—to the decisions of which alone resort must be finally had in determining the scope of such power. As the Constitution spoke the will of the people when originally adopted, the same authority reserved to itself the power of change, in a designated manner, as experience might suggest. James Madison in the Federalist, No. XLII, said:

> That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided.

John Marshall, afterwards Chief Justice of the United States, speaking before the Virginia Convention June 10, 1788, in urging the ratification of the Constitution, said:

> The government is not supported by force, but depends on our free will. When experience shall show us *any* inconvenience we can correct it, but until we have experience on the subject, amendments as well as the constitution itself, let us try. Let us try it, and keep our hands free to change it when necessary.

These great minds of that period suggested no limitation upon the power of amendment other than as found in the instrument itself.

The almost infinite variety of subjects dealt with in the Constitution, even before the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, would seem to indicate that the way was purposely left open for dealing in the future by amendment with any subject that might be regarded of vital concern to the people of all the states, either in their relations, political or otherwise, to each other, or to the states or the general government. But an implied limitation upon amendments is asserted in certain quarters, to arise out of the Tenth Amendment, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

The fact that this provision was incorporated into the Constitution by amendment instead of being a part of the original instrument, adds nothing to its sacredness; nor does it give to it any effect beyond any other provision of the same instrument. Having become a part of the Constitution the same power of change, express or implied, attached to it as to any other provision found in it. As experience might show that other powers than those granted or prohibited by the original instrument should be delegated to the United States or prohibited to the states, the power of change attached to it the same as though it were expressly reserved in the Constitution.

The fact, too, that certain changes are prohibited in Art. V, by every rule of construction, excludes the idea that any other prohibition is implied.

It is even suggested, in a paper by Mr. Everett P. Wheeler, in the February, 1921, number of your Journal, that any amendment which encroaches upon the powers reserved to the states or to the people when the Tenth Amendment to the Constitution was adopted must have unanimous consent of the states to become effective, otherwise they remain inviolable. Where in the Constitution is any such limitation found? It either requires but three-fourths of the states for its ratification, as provided by Art. V, or an amendment is wholly beyond the power of valid ratification. This must necessarily result, as that article is the sole authority found in the Constitution for its alteration.

Not only does the rule of practical construction, as exemplified in the Thirteenth, Fourteenth and Fifteenth Amendments, effectively combat any contention to the contrary, but the numerous decisions of the highest tribunal in the land, recognizing the binding force of these three amendments, controvert the claim. If the states can be forbidden by the Fifteenth Amendment to deprive a citizen of the right of suffrage because of color, race or previous condition of servitude, can they not also be forbidden to deprive the citizen of such right because of sex? Each prohibition finds effect through the power of amendment contained in Art. V, or it can have no effect, since there is no other method of effecting such a change in the Constitution. If the courts can find sufficient authority in Art. V for guaranteeing through amendment of the Constitution the right of suffrage to negroes, may they not also find adequate authority in the same article for guaranteeing the right of suffrage to women? It would seem so, since the two amendments relate to the same subject—suffrage.

The court in Guinn vs. United States (238 U. S. 347, 362), in declaring an Oklahoma statute invalid as in conflict with the Fifteenth Amendment, affirmed in a most pronounced manner the fact and importance of the possession by the states of power over suffrage, without intimating that this could in any sense detract from the power of amendment under Art. V. On the contrary the court affirmed the binding force of the amendment without qualification.

But, it is said that these three amendments—particularly the Fifteenth—were an outgrowth of the Civil War. What difference does that make? The conditions prevailing after the Civil War, or immediately before its close, merely demonstrated that such enactments were needed, as experience since that time has indicated the wisdom of still further amendments. But there was nothing in the conditions growing out of the Civil War to effect *ipso facto* an enlargement of the power of amendment beyond that found in Art. V. The Constitution can not be amended in any such manner. The three amendments named were submitted to the states by Congress and ratified under the authority of Art. V and took effect solely because so adopted. As said by the court in Hawke vs. Smith, 253 U. S. 221, 230:

> The act of ratification by the state derives its authority from the Federal Constitution to which the state, and its people, have alike assented.

If not in accordance with that article, those amendments would have been declared by the Supreme Court ineffective, instead of their validity being recognized.

Mr. Wheeler in the paper referred to speaks of these amendments being imposed upon the seceding states as a condition of their "readmission into the Union." But these states were never out of the Union, hence were never readmitted. The war was fought upon the postulate that a state can not, constitutionally, secede, and that assumption has at no time since been abandoned. But, why say those amendments were imposed upon the seceding states as a condition of readmission into the Union when they were just as surely imposed upon the non-seceding states, as upon the seceding states? The fact is that no such extra-constitutional power can, logically or lawfully, be assigned

for these enactments. They were enacted, not under a war power, outside of the Constitution, but under an express power found in that instrument itself. There was no occasion to go outside of that charter to find power for their adoption, because ample power was therein granted.

Mr. Wheeler also says in the paper referred to, to deprive a state of the right to determine the qualifications of the voters at state elections, "is to extend the Constitution to a field entirely different from any covered by it." Of course this assertion leaves out of consideration entirely the Fourteenth and Fifteenth Amendments. But suppose the claim be admitted, the argument against the suffrage amendment is not thereby advanced. There is nothing in the Constitution to restrict amendments to the subjects already embraced within its provisions. Every state upon its admission into the Union consents to every term of the Constitution, to the same extent as though it were one of the original thirteen. It consents to be governed, in so far as government may be effected or affected through amendments to the Constitution in accordance with Art. V. It in effect grants to three-fourths of the states, in conjunction with two-thirds of the two houses of Congress, power to enact, in the manner prescribed in Art. V, amendments to the Constitution without restriction as to subject, except in two respects, now reduced to one. It matters not whether an amendment is of a very radical and unusual character or is even in a field different from any covered by provisions already found in the Constitution, if experience shows, as in the case of the Thirteenth, Fourteenth and Fifteenth Amendments, that the matter to be dealt with should, in the view of two-thirds of the Congress and the legislatures of three-fourths of the states, be incorporated into the Constitution. If, as Art. V declares, two-thirds of both houses of Congress "shall deem it necessary," they may propose amendments, which, when ratified, "shall be valid to all intents and purposes as part of the Constitution," why may not such amendment be proposed and ratified? Is there any restraint in this language or elsewhere, on the discretion of the two houses as to what amendments they shall propose, or upon the legislatures of the states as to what amendments they may ratify? It seems not. These provisions go upon the assumption, and rightly so, too, that three-fourths of the states will not ratify an amendment, even if the Congress is willing to propose it, that may not safely and fitly become a supreme law of the land—certainly not when it acts as a restraint upon the reserved powers of the states. Such a large majority of the states are and safely may be entrusted to protect under Art. V the rights of the states to local self-government, by refusing to ratify any unwise or unfavorable surrender of any such right.

It may be said of the power of Congress and of the states, in the matter of amending the Constitution, as the court said in the recent case of Walls vs. Midland Carbon Co., relative to the exercise by the states of the police power: They "may consider the relation of rights, and accommodate their co-existence, and, in the interest of the community (people of all the states) limit one that others may be enjoyed." Without such a comprehensive view of the power of amendment, there would be little room for accommodating legislation, national or state, to the constantly changing conditions of growth and advancement, in the almost limitless concerns which affect the well-being of society, socially, politically and economically.—H. O. FAIRCHILD.

Procedural Reform and the Law Schools

Cambridge, Mass., Mar. 26.—To the Editor: The members of the American Bar Association may be interested in learning that in several of the law schools in this country, courses are being given on the subject of Procedural Reform. For about five years the writer has given in the Harvard Law School such a course, which he calls "Modern Developments in Procedural Law." The scope of the course is shown by the outline given below. The course is in the nature of a seminar, and is attended by graduate law students, and a few selected third-year students, who have already studied the subjects of pleading and practice.

The purpose of the course is to familiarize the students with the movements past and present for improving legal procedure. There is a great body of literature available for the purpose. Among the valuable sources are the annual reports of the American Bar Association, and of the various State Bar Associations, containing the reports of committees and papers and discussions. There are also available the reports of various English commissions and of the Code Commissions and Judicature Commissions of various states. The bulletins of the American Judicature Society afford excellent material for the course. There is also a considerable body of periodical literature which has appeared chiefly within the last dozen years. Dean Pound has published in the Illinois Law Review for February 1917 and in the Massachusetts Law Quarterly for May 1920 a very useful Bibliography of Procedural Reform. The judicial decisions and statutes, for example the English Judicature Act, and the New Jersey Practice Act and the Michigan and Pennsylvania Judicature Acts, and recent Wisconsin statutes, are among the original sources which are studied.

Each student in the course is required to write a thesis or article on some subject relating to Procedural Reform, which is usually published in one or another of the law magazines. One student, for example, has made a survey of the various reforms approved by the American Bar Association and has shown how far these reforms have been adopted by legislation and how far they have apparently proved successful.

In several law schools, notably the law schools of the University of Michigan and the University of Pennsylvania, somewhat similar courses are being given. It is to be expected that a considerable number of law schools will give similar courses in the near future. A committee of the Association of American Law Schools is now engaged in compiling a Source Book on Modern Procedural Methods which will be available as a text-book. It seems to the writer that such a study by qualified students of the general field of procedural law, from the teleological point of view, cannot fail ultimately to be of value in contributing to the progress of the law.

It is natural for the bar in any state to hesitate to advocate untried experiments in the field of procedural law. If it can be shown, however, that such experiments have been made with success in some other state or in England or in one of the English dominions, the cause for hesitation is removed. It would seem therefore that the study of comparative procedural law is one which is of great and growing importance.

AUSTIN W. SCOTT.

MODERN DEVELOPMENTS IN PROCEDURAL LAW

I. Form and Sources of Procedural Law: 1. Common law; 2. Statutes; 3. Rules of court.
II. Judicial Organization: 1. Separate courts or a single unified court; 2. Selection and tenure of judges.
III. Avoidance of Litigation: 1. Arbitration; 2. Conciliation; 3. Administrative tribunals.
IV. Place of Bringing Action: 1. The proper county; 2. The proper state.
V. Jurisdiction over Person or Property: 1. Jurisdiction over natural persons— (a) Non-residents, (b) Residents; 2. Jurisdiction over corporations—(a) Domestic, (b) Foreign; 3. Jurisdiction over property—(a) Proceedings begun by attachment or garnishment, (b) Proceedings in rem.
VI. Parties: 1. Who may sue and be sued; 2. Who may or must join as plaintiffs; 3. Who may or must be joined as defendants; 4. Effect of mis-joinder and non-joinder—(a) At common law, (b) Under Codes, (c) Under modern Practice Acts.
VII. Purpose and Function of Pleadings: 1. Nature of claim or defence—(a) Forms of action at common law, (b) Theory of pleadings under Codes; 2. Defective pleadings—(a) Nature of defects, (b) Aider by verdict, (2) Supplying defects by evidence; 3. Amendment of pleadings—(a) Time of making amendments, (b) Character of amendments.
VIII. Voluntary Non-suit or Discontinuance.
IX. The Right to Trial by Jury: 1. Constitutional provisions; 2. Number of jurors; 3. Unanimity.
X. Securing a Proper Jury: 1. Excuses; 2. Exemptions; 3. Disqualifications.
XI. Functions of Judge and Jury: 1. Questions arising on the pleadings; 2. Motion to strike out sham pleadings; 3. Conduct of the trial; 4. Instructions; 5. Special verdicts and special findings; 6. Verdict subject to opinion of court; 7. Directing a verdict or nonsuit, demurrer to evidence; 8. Judgment on the evidence notwithstanding the verdict; 9. Evidence on appeal.
XII. Judgments: 1. By confession; 2. By default; 3. On the pleadings; 4. On verdicts; 5. Flexibility of judgments—(a) Judgment for or against one or more of the parties, (b) Judgment against co-plaintiffs or co-defendants; 6. Declaratory judgments.
XIII. Review in the Trial Court and in the Appellate Court: 1. Motions and errors or appeal on the pleadings; 2. Motions and error or appeal not on the pleadings—(a) Reversal or affirmance: (1) Necessity of objection; (2) Necessity of exception; (3) Immaterial errors; (4) Non-prejudicial errors. (b) New trial: (1) New trial on part of the case or as to some of the parties; (2) Preventing new trial by remitting damages; (3) Judgment notwithstanding the verdict; (4) Additional evidence. (c) Appellate Procedure: (1) Nature of appellate proceedings; (2) The right to appeal—Appeal from final judgments, Appeal from interlocutory orders and judgments; (3) Record on appeal.

Statehood for Porto Rico

Ponce, P. R., March 30.—To the Editor: There are over a million Portorican-American citizens deeply interested in a proper answer to the above question, which apparently presents a complex political and constitutional proposition.

We would not, however, hesitate in answering the question in the affirmative, in view of the fact that the main argument heretofore advanced against Statehood for the outlying territories of the United States has been their non-contiguity to the mainland, which objection seems to have been already dismissed by the clear policy of the United States respecting the outlying territories of Hawaii and Alaska.

Thus, by the Newlands Joint Resolution of July 7, 1898, and by the Act of April 30, 1900, Congress annexed the non-contiguous Hawaiian Islands as an integral part of the United States, made the citizens of the Hawaiian Republic American citizens and formally extended the Federal Constitution to these Islands, thereby giving them the status of an incorporated territory (Hawaii v. Mankichi, 190 U. S. 197, 47 L. Ed. 1920).

By the treaty under which Alaska was acquired from Russia and subsequent congressional legislation relating thereto, such territory became incorporated into, and was made an integral part of, the United States (Rasmussen v. U. S., 197 U. S. 519, 49 L. Ed. 862-867), notwithstanding its outlying condition and its non-contiguity to the mainland of the United States.

And, since "incorporation" is now constitutionally equivalent to a pledge of future statehood, for it implies that the territory thus situated has become a part of the United States proper, as much as the states are, and not merely a part of its domain, and that it is entitled to the full benefits of the Constitution which, as citizenship, when once extended or granted by Congress, becomes irrevocable, it follows that the Congressional incorporation of the non-contiguous territories of Hawaii and Alaska clearly evinces the policy of the American Government and of its Congress to admit, some time in the future, as additional states of the American Union, such of its outlying territories as Congress may, in its wisdom, determine.

Besides, Porto Rico is now a fully organized, though, as yet, unincorporated, territory of the United States, and all territories look forward to ultimate statehood, as has been observed by Mr. Woodburn, the learned professor of politics at Indiana University, in his excellent work entitled, "The American Republic and Its Government" (pp. 360, 361, 364), where he authoritatively states that:

> Congress has always had in view the admission of the territories as States of the Union . . . We may ask, could these outlying territories and possessions be admitted to Statehood? There is nothing in the way. It is merely a matter of expediency and it is not unlikely that Alaska will soon be admitted . . . It was by the fact that it had always been our policy and intention to admit the territories to statehood as soon as practicable and safe, that we "saved our face" in our profession of adherence to "taxation by representation" and "government by consent." . . .

The other weaker argument, sometimes urged against the possibility of this Island ultimately becoming a State of the Union, consists in the erroneous assertion that "difference in customs, language, religion, modes of thought and ethnological reasons," stands in the way as an insurmountable obstacle, but it will suffice, to show that such contention is entirely devoid of merit, to simply transcribe a portion of the United States Supreme Court's opinion in Downes v. Bidwell (182 U. S. 287, 45 L. Ed. 1106), as follows:

> . . . Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action. . . .

Hence, it is unquestionable that Porto Rico may constitutionally become a State of the American Confederacy, whenever in the future Congress shall see fit so to determine.—JOSE A. POVENTUD.